

2010

Constitutional Politics and Balanced Budgets

Nancy Staudt

Northwestern University School of Law, n-staudt@law.northwestern.edu

Repository Citation

Staudt, Nancy, "Constitutional Politics and Balanced Budgets" (2010). *Faculty Working Papers*. Paper 59.
<http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/59>

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Faculty Working Papers by an authorized administrator of Northwestern University School of Law Scholarly Commons.

CONSTITUTIONAL POLITICS AND BALANCED BUDGETS

Nancy C. Staudt*

Unbalanced budgets have sparked decades of debate among legislators, scholars, and the public at large. Although the controversy has abated somewhat in recent years given the pending budget surplus, many continue to believe that Congress has a tendency to pursue a level of public debt that is both inefficient and unfair. Foremost among those who criticize the federal budgeting process are fiscal constitutionalists, a group of public choice scholars who believe that constitutional constraints are the only means by which the public will obtain protection from legislative fiscal irresponsibility.

In this article, Professor Staudt explores the public choice argument for a balanced budget amendment. She first notes that public choice theorists reject budget constraints in the ordinary statutory context but support them if they are embedded into the Constitution. These divergent views are related to the idea that, unlike statutory decisionmakers, constitutional decisionmakers act behind a veil of ignorance, leading them to make choices that promote the overall public good. Professor Staudt argues that the veil (if it exists at all) will not completely obscure legislators' understanding of the political costs associated with a balanced budget amendment. Accordingly, she asserts that the legislators are unlikely to adopt an effective balanced budget amendment but will act as if they support the measure in order to gain the support of those contributors and voters who embrace this type of fiscal reform.

Not only does Professor Staudt reject the claim that constitutions are always above politics, she argues that legislators may act for the greater public good in the ordinary statutory context. She points out that Congress has recently achieved a balanced budget despite the absence of a constitutional amendment mandating it to do so. This outcome might be the result of the political pressure generated by the decades of debate around unbalanced budgets and the near consensus that has evolved regarding the inefficiencies

* Associate Professor of Law, State University of New York at Buffalo.

I thank Guyora Binder, John Cogan, Beth Garrett, Barbara Fried, Barry Friedman, Mark Kelman, Kyle Logue, Roger Noll, Rick Pildes, Kathleen Sullivan, Elizabeth Warren, and the participants at the Stanford Law School and SUNY-Buffalo faculty workshops and the Taxation in a Democracy Workshop for their helpful comments. I also thank Sara Buehler of Stanford Law School and Marie Small of SUNY-Buffalo Law School for their excellent research assistance.

and unfairness associated with the high levels of public debt Congress has maintained. In short, the public choice theorists may have accomplished their goal of balanced budgets without forcing a change to our constitutional order—a change many have found deeply problematic.

I. INTRODUCTION

Despite evidence that Congress and the Executive will produce a budgetary surplus in the 1998-1999 fiscal year,¹ scholars and commentators continue to be skeptical about the federal budgeting process. Many argue that the federal surplus is not a function of difficult political decisions associated with tax increases or spending cuts² but that the legislators have been the lucky beneficiaries of a thriving national economy that has produced unexpected tax revenue.³ As soon as the economy takes a turn for the worse, it is argued, the federal purse will once again be emptied, and the budget deficit will reappear.⁴

Public choice theorists, in particular, argue that citizens cannot rely upon congressional representatives to exercise fiscal responsibility in the context of the federal budget. At the same time, they believe that the statutory limits imposed upon federal spending are futile given Congress's ability to maneuver around the goals and aims of statutory law.⁵ According to public choice theorists, the only means for truly constraining the budgetary process is to adopt a balanced

1. For such a claim, see, for example, President William J. Clinton, Address Before a Joint Session of the Congress on the State of the Union, in 34 WEEKLY COMP. PRES. DOC. 129, 130 (Jan. 27, 1998), in which Clinton claimed his 1998-99 fiscal year budget proposal will produce a balanced budget and possibly a budget surplus. See also John F. Harris & Eric Pianin, *Clinton to Propose '99 Balanced Budget; Plan Would Beat Target by Three Years*, WASH. POST, Jan. 6, 1998, at A1 (discussing predicted balanced budget and budget surplus).

2. See Richard Stevenson, *The Balanced Budget: The Politics*, N.Y. TIMES, Jan. 6, 1998, at A12 (arguing politicians have not reduced the federal deficit by raising taxes or decreasing spending). But see Robert Pear, *Budget Heroes Include Bush and Gorbachev*, N.Y. TIMES, Jan. 19, 1998, at A12 (arguing that congressional representatives have made politically difficult spending cuts and taxation increases).

3. See Stevenson, *supra* note 2, at A12 (stating "evidence suggests that it has been a stronger-than-expected economy more than any belt tightening or political fortitude in Washington that led to a [balanced budget]"); see also Dinesh D'Souza, *How Reagan Reelected Clinton*, FORBES, Nov. 3, 1997, at 118, 122 (arguing Reagan's supply-side tax cuts produced economic growth that enabled Clinton to reduce the federal deficit).

4. See Roger K. Lowe, *Balanced Budget May Quickly Fade Away*, COLUMBUS DISPATCH, Sept. 14, 1997, at B13 (noting that Congress's spending surplus may not exist if economy falters).

5. See, e.g., Budget Enforcement Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (codified in scattered sections of 2 U.S.C. (1994)) (requiring that all tax expenditures be paid for with tax increases); The Line Item Veto Act of 1996, Pub. L. 104-130, 110 Stat. 1200 (codified at 2 U.S.C.A. § 691 (West 1997)) (giving the executive the power to veto spending projects in certain circumstances); Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038, amended by Balanced Budget and Emergency Deficit Reduction Reaffirmation Act of 1987, Pub. L. No. 100-119, 101 Stat. 754 (codified as amended at 2 U.S.C. §§ 901-22 (1994)) (imposing debt ceiling and automatic spending cuts); see also Edward Davis, *The Evolution of Federal Spending Controls: A Brief Overview*, 17 PUB. BUDGETING & FIN. 10, 10-24 (1997) (outlining the various statutory restrictions that Congress has imposed upon itself since 1974). For a discussion of Congress's ability to maneuver around statutory law, see JAMES M.

budget amendment to the U.S. Constitution.⁶ A constitutional precommitment to balanced budgets would impose firm and long-lasting constraints on the political process, thereby revolutionizing government as we know it today.

While the argument for a “constitutional revolution”⁷ originated with the public choice scholars, it has gained momentum outside academic debates. Gallup polls taken over the course of the last two decades consistently reflect widespread popular support for the balanced budget amendment.⁸ Many citizen-taxpayers view the proposal as the only way to place limits on the legislature, which tends to spend far beyond its means.⁹ Like the public choice scholars advocating the balanced budget amendment, many individuals are skeptical that the federal budget will remain balanced without a constitutional mandate.¹⁰

Federal and state legislators have also expressed support for the so-called constitutional revolution. Federal legislators have considered the merits of balanced budgets in congressional hearings every

BUCHANAN & RICHARD E. WAGNER, *DEMOCRACY IN DEFICIT: THE POLITICAL LEGACY OF LORD KEYNES* 173-85 (1977).

6. See BUCHANAN & WAGNER, *supra* note 5, at 180 (proposing a balanced budget amendment to control the growth of the government); William Breit, *Starving the Leviathan: Balanced Budget Prescriptions Before Keynes*, in *FISCAL RESPONSIBILITY IN CONSTITUTIONAL DEMOCRACY* 9, 9-24 (James M. Buchanan & Richard E. Wagner eds., 1978) (viewing Keynesian economics as a threat to liberty and arguing for “a new moral equivalent to the balanced-budget rule”).

7. See, e.g., JAMES M. BUCHANAN, *FREEDOM IN CONSTITUTIONAL CONTRACT: PERSPECTIVES OF A POLITICAL ECONOMIST* 297-99 (1977) (advocating a constitutional revolution); JAMES M. BUCHANAN, *THE LIMITS OF LIBERTY* 168-69 (1975) (describing his proposed constitutional reforms as revolutionary).

On the surface, the notion of a constitutional revolt seems contradictory. The Framers of the Constitution sought to impose firm and long-lasting constraints on the political process, promoting order and stability through the entrenchment of institutional arrangements. See Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 636 (1991) (“Madison envisioned firm and lasting constitutional constraints as a precondition for democratic processes, rather than a check on them.”). See generally STEPHEN HOLMES, *PASSIONS AND CONSTRAINT* (1995) (exploring the political, social, and economic value of the constitutional precommitment device). The purpose of the Constitution, therefore, is at odds with the purpose of a revolution. Constitutions seek to preserve the status quo while revolutions seek to undo it. See David C. Williams, *The Constitutional Right to a Conservative Revolution*, 32 HARV. C.R.-C.L. L. REV. 413, 423 (1997) (exploring the inconsistent goals of constitutionalism and revolutions).

8. See, e.g., David W. Moore, *Crime Legislation, Deficit Reduction Top Public's “Wish List,”* THE GALLUP POLL MONTHLY, Jan. 1995, at 2, 3 (reporting 77% of respondents think Congress should make the balanced budget amendment a top priority).

9. Compare Larry Hugick, *The “Peace Dividend,”* THE GALLUP POLL MONTHLY, Oct. 1991, at 10, 11 (indicating 90% of respondents indicate that reducing the deficit was either very or somewhat important), with *Gallup Short Subjects: Clinton's Handling of Issues—Trend*, THE GALLUP POLL MONTHLY, Mar. 1994, at 27 (reporting 68% of respondents think the balanced budget amendment is necessary to get the federal deficit under control). See also DAVID KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995*, at 432 (1996) (noting that public opinion polls repeatedly show “two-thirds or more (sometimes substantially more) of Americans favoring a balanced federal budget”).

10. See William M. Welch & Susan Page, *Public Isn't Banking on Budget Surpluses*, U.S.A. TODAY, Jan. 9, 1998, at A6 (“‘Chance of balanced budget is a joke. That's not even possible. That's not going to happen,’ homemaker says”).

year for almost two decades¹¹ and in 1995 missed ratifying the amendment by a single vote.¹² By early 1997, the Senate Judiciary Committee had submitted the proposal for reconsideration by the full Senate, arguing that a constitutional balanced budget amendment would "serve as a moral and legal beacon to guide the Nation."¹³ At the same time, thirty-two state legislatures have voted to convene a constitutional convention to debate the possibility of imposing constitutional constraints on federal fiscal policymaking.¹⁴

Counter revolutionaries, however, exist. Opponents of the proposed balanced budget amendment argue it will permanently harm the democratic decision-making process,¹⁵ lead the economy into fiscal crisis,¹⁶ and promote social discord.¹⁷ These objections have led

11. See S. REP. NO. 105-3, at 3-7 (1997) (providing a brief overview of the legislative history of proposed balanced budget amendments). Representative Harold Knutson introduced the first balanced budget amendment in 1936. See David E. Kyvig, *Refining or Resisting Modern Government? The Balanced Budget Amendment to the U.S. Constitution*, 28 AKRON L. REV. 97 (1995) (tracing the history of proposed balanced budget amendments from 1936 through 1995). Since 1936, 67 amendments have been introduced into Congress. See S. REP. NO. 105-3, at 3-7 (stating that 12 balanced budget amendments were introduced between 1986 and 1997); David Lubecky, *The Proposed Federal Balanced Budget Amendment: The Lesson from the State Experience*, 55 U. CIN. L. REV. 563, 564 (1986) (stating that 55 balanced budget amendments were introduced into Congress between 1955 and 1986).

12. The five-term senator from Oregon, Mark Hatfield, cast the vote that led to the defeat of the amendment. See KYVIG, *supra* note 9, at 445-46 (tracing the development of the balanced budget amendment politics and discussing the details of the 1995 proposal). Since registering the lone vote against the amendment, Hatfield has become something of a revered figure in the Senate. See 143 CONG. REC. S1722 (daily ed. Feb. 27, 1997) (statement of Sen. Bumpers) ("How I miss the towering courage of Mark Hatfield in this body.").

13. S. REP. NO. 105-3, at 16. The constant discussion and the overwhelming support for the balanced budget amendment have had effects on the budgetary process. President Clinton, for example, has actively sought to reduce the deficit. See KYVIG, *supra* note 9, at 446-47 (arguing that popular debates have had political consequences); Jerry Grey, *Bills on Spending Are Moving Easily Through Congress*, N.Y. TIMES, Aug. 3, 1997, at A1 (discussing bipartisan deal for balancing the budget); see also *infra* notes 325-55 and accompanying text (discussing underlying reasons for politicians willingness to balance the budget).

14. See E. Donald Elliott, *Constitutional Conventions and the Deficit*, 1985 DUKE L.J. 1077, 1078 (stating 32 state legislatures have adopted resolutions calling upon Congress to convene a constitutional convention). But see Letters to the Editor, *Clear Thinking Alabamians*, WASH. POST, May 19, 1988, at A24 (applauding Alabama for withdrawing its petition for a constitutional convention).

15. See, e.g., Kathleen M. Sullivan, *Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever*, 17 CARDOZO L. REV. 691, 696 (1996) (explaining that amendments like the balanced budget proposal not only politicize the Constitution, but they allow one generation to tie the hands of the another); Note, *The Balanced Budget Amendment: An Inquiry into Appropriateness*, 96 HARV. L. REV. 1600, 1604-05 (1983) (arguing balanced budget amendment prescribes substantive values when constitutions should only prescribe processes which enhance broad participation); cf. Lawrence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency*, 98 HARV. L. REV. 592, 592 (1985) ("The Constitution cannot be cabined in any calculus of costs and benefits.").

16. See, e.g., S. REP. NO. 105-3, at 34-35 (minority views of Senators Leahy, Kennedy, and Feingold) (arguing that the proposed balanced budget amendment will worsen recessions and possibly lead to depressions).

17. For a discussion of the political consequences of statutory mandates, see, for example, Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CAL. L. REV. 593, 620 (1988) (explaining that by making every program vulnerable every year, balanced budget mandate promotes interest group conflict).

theorists on both sides of the debate to give extensive consideration to the issues raised by the proposal as well as the technical drafting problems associated with the reform.¹⁸

Surprisingly few scholars, however, have explored whether a balanced budget amendment is a realistic political possibility given legislators' strong aversion for constraints upon their discretionary powers. In other words, an important but underexamined question is whether politicians will ever agree to restrain their own fiscal freedom even if scholars and theorists universally agree it is the best course of action for Congress to take. After all, without the freedom to spend and not tax, legislators may find that their ability to obtain votes and contributions will drastically decrease.¹⁹ This question is of particular importance because public choice theorists have been the most forceful proponents of the amendment, yet they acknowledge that self-interested politicians would reject a balanced budget mandate in the *statutory* context.²⁰ Why, then, do these same theorists suggest it is possible to pass a *constitutional* amendment that forces Congress to balance its budget? Paradoxically, public choice theorists believe that, while statutory decisionmaking promotes the goals and aims of narrow, self-interested groups, constitutional decisionmaking promotes the greater overall good.²¹ This article explores why public choice theorists make these conflicting predictions and argues that such predictions are unwarranted, at least with regard to the proposed balanced budget amendment.

This article is organized as follows. Part II explains the public choice argument for placing the budget controversy into the constitutional setting.²² The argument rests primarily on the notion that constitutional decisionmakers, unlike those in the statutory context, make decisions behind a veil of ignorance. Put differently, constitutional moments arguably transform legislators into impartial and disinterested actors seeking to promote the greater public good rather than their own private, self-interested ends. Part III criticizes this view, arguing that federal and state legislators are not behind a thick veil of ignorance, but only a thin, partial veil that allows them to identify the costs and benefits associated with ratifying the balanced budget amendment.²³ Because the personal and political costs of the propo-

18. See *infra* notes 38-48 and accompanying text.

19. This view is found throughout the public choice literature. See *infra* notes 32-40 and accompanying text.

20. See *infra* notes 69-106 and accompanying text.

21. See *infra* notes 69-106 and accompanying text.

22. See *infra* notes 28-106 and accompanying text.

23. Public choice theorists regularly charge traditional public finance theorists with being naive and utopian. See, e.g., James M. Buchanan, *Clarifying Confusion About the Balanced Budget Amendment*, 49 NAT'L TAX J. 347, 348 (1995) (arguing that economists persuaded by Keynesian theory wear "romantic blinders"). This article argues fiscal constitutionalists are just as utopian.

sal are high, this section argues, most legislators will not support an effective balanced budget amendment. Those who do advocate its adoption do so not because they are impartial agents seeking to promote the interests of society at large, but because they believe the amendment will increase their overall net rents in the political process. Thus, while public choice theorists argue that legislators are above politics in the constitutional setting, the article argues that legislators can and will consider their own interests irrespective of the context in which they find themselves.

Part IV explores why many legislators have demonstrated an abiding commitment to the proposed budget amendment when it does not appear to advance their own self-interested ends.²⁴ This part considers the symbolic value of the budget amendment in popular and political culture and argues that politicians who support the proposal appear fiscally responsible and committed to reduced federal taxation. Accordingly, by advocating a balanced budget amendment without ever actually adopting it (or perhaps adopting one riddled with loopholes and exceptions), legislators seem to advance the greater social good while actually maintaining the status quo. The political and social meaning of the balanced budget amendment, therefore, has enabled opportunistic legislators to gain politically, even as they stand opposed to constitutional limitations on the budgeting process.

Finally, part V discusses the effect that the debate over the balanced budget amendment has had upon the contemporary fiscal process.²⁵ It argues that by highlighting the problems associated with deficit spending, public choice theorists have contributed to a major shift in both popular and expert thinking on the issue. Throughout much of this century, individuals have viewed deficit spending as an important feature of national economic policymaking.²⁶ Voters, scholars, and policymakers, however, now widely consider high levels of public debt to be fiscally irresponsible.²⁷ These views, in turn, have led Congress and the Executive to pursue a balanced budget even absent a constitutional mandate to do so. In short, while public choice theorists argue that only the Constitution is capable of constraining the legislators, social and political norms can also have a significant impact on the political process.

24. See *infra* notes 202-324 and accompanying text.

25. See *infra* notes 325-56 and accompanying text.

26. See *infra* notes 342-47 and accompanying text.

27. See *infra* notes 347-55 and accompanying text.

II. FISCAL CONSTITUTIONALISM: A THEORY FOR AMENDING THE BUDGET PROCESS

A. *Ordinary Politics and the Budgetary Crisis*

Fiscal constitutionalism is a branch of public choice theory that explores budgetary decisionmaking in the constitutional context. Like public choice theorists generally, fiscal constitutionalists believe that politicians are motivated by their own interests rather than by the interests of society at large.²⁸ Despite the deep pessimism that runs throughout the public choice literature,²⁹ however, fiscal constitutionalists are idealists. They argue that placing everyday controversies into the constitutional context will lead legislators to rise above their personal goals and aims and make decisions that promote the greater public good.³⁰ This hopeful view of constitutional politics has led many to reject budget-balancing measures in the ordinary statutory context while embracing them in the constitutional setting.³¹

To understand why fiscal constitutionalists are idealists when it comes to the Constitution, it is important to understand the perceived problems with everyday statutory lawmaking.³² Fiscal constitutionalists believe that "legislation transfers wealth from society as a whole to those discrete, well-organized groups that enjoy superior access to the political process, and that government will enact laws that reduce

28. See Geoffrey Brennan & James M. Buchanan, *Predictive Power and the Choice Among Regimes*, 93 ECON. J. 89, 89 (1983) (noting that the behavioral model in its market setting is familiar and uncontroversial but in the political setting is viewed as naive and ideologically biased). Brennan and Buchanan argue that the public choice is, in fact, not a new theoretical development, but rather, quite similar to classical political economists such as Mill and Hume. See *id.* (citing and quoting the work of David Hume and John Stuart Mill); see also David Hume, *On the Independency of Parliament*, in 1 ESSAYS: MORAL, POLITICAL, AND LITERARY 117, 117-18 (T.H. Green & T.H. Grose eds., 1875) ("[I]n contriving any system of government, and fixing the several checks and controuls of the constitution, every man ought to be supposed a *knave*, and to have no other end, in all his actions, than private interest.").

29. See BUCHANAN & WAGNER, *supra* note 5, at 156-58 (criticizing statutory rules and arguing Congress can make easy end-runs around them); Richard L. Doernberg & Fred S. McChesney, *Doing Good or Doing Well?: The Tax Reform Act of 1986*, 62 N.Y.U. L. REV. 891, 897-98 (1987) (critiquing tax legislation and noting that it works to the advantage of discrete, well-organized interest groups); Richard L. Doernberg & Fred S. McChesney, *On the Accelerating Rate and Decreasing Durability of Tax Reform*, 71 MINN. L. REV. 913, 926 (1987) (same).

30. See, e.g., BUCHANAN & WAGNER, *supra* note 5, at 173-81 (proposing balanced budget amendment as a solution to the fiscal problems that occur at the statutory level); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 247-49 (1986) (arguing that constitutions are public-regarding documents).

31. Of course, some theorists argue that government regulation, both statutory and constitutional, is flawed for its special interest features. See, e.g., Richard A. Posner, *Economics, Politics, and the Reading of Statutes and Constitutions*, 49 U. CHI. L. REV. 263, 272-90 (1982).

32. In describing the "market for legislation," public choice theorists generally argue that interest groups and voters form the demand side while the legislature forms the supply side of the market. See, e.g., William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 285 (1988) ("Public choice theorists typically treat legislation as an economic transaction in which interest groups form the demand side, and legislators form the supply side.").

societal wealth and economic efficiency in order to benefit these economic groups.”³³ Although they do not argue that it is impossible to adopt laws that are public regarding, fiscal constitutionalists do predict that legislation generally will reflect the bargains struck between particular interest groups and that congressional decisions will tend to be both inefficient and unfair.³⁴ This proposition holds even when legislators seek to support only the programs and policies they believe advance the greater public good. Consider the legislator who views deficit spending as fiscally irresponsible. A single politician who withholds support for the spending policies that she believes are unsound is unlikely to affect the overall size of the deficit, yet she might negatively affect the benefits that her constituents derive from the lawmaking process.³⁵ Put differently, the legislator’s negative vote on a proposed project might cause others to retaliate against her by withholding support for the legislation she proposes, ultimately causing the public-regarding legislator to lose support in her own district. Accordingly, fiscal constitutionalists argue that most legislators engage in a strategy of vote-trading or logrolling to ensure their own spending proposals gain sufficient votes for enactment, a process often described as “universalism.”³⁶ Thus, even if reduced spending were perceived to be in the public interest, legislators are unlikely to pursue this agenda in the ordinary political process given the explicit or implicit agreement to support the enactment of all proposed projects.³⁷

33. Macey, *supra* note 30, at 230. Theorists have identified a pattern of supply and demand for legislation. First, Congress is unlikely to adopt legislation that widely distributes benefits and costs, and any bill proposing such distribution is likely to be more symbolic than substantive. See Eskridge, *supra* note 32, at 288-90. Second, if the proposed legislation provides concentrated benefits and distributed costs, it is likely to garner support from strong interest groups and little opposition from the diffuse and disinterested public—prompting Congress to adopt it. See *id.* Third, if the legislation imposes concentrated costs and widely distributed benefits, Congress is unlikely to adopt it because opposition will tend to be stronger than support. See *id.* Finally, legislation providing concentrated benefits and concentrated costs will produce strong interest groups on both sides ultimately deterring Congress from action. See *id.* For a useful, in-depth explanation of these phenomena in graph form, see *id.* at 290.

34. See Posner, *supra* note 31, at 268-72 (explaining that some legislation will serve the public good but much of it can only be described as “amorally redistributive”).

35. See Robert D. Tollison & Richard E. Wagner, *Balanced Budgets and Beyond*, in *DEFICITS* 374, 377 (James M. Buchanan et al. eds., 1987).

36. See Michael Fitts & Robert Inman, *Controlling Congress: Presidential Influence in Domestic Fiscal Policy*, 80 GEO. L.J. 1737, 1742-55 (1992) (explaining and critiquing the norm of universalism on fiscal policy); see also generally Melissa Collie, *The Legislature and Distributive Policymaking in Formal Perspective*, 13 LEGIS. STUD. Q. 427 (1988) (providing an overview of literature on universalism); Barry Weingast, *A Rational Choice Perspective in Congressional Norms*, 23 AM. J. POL. SCI. 245 (1979) (supplying an early exploration of the concept of universalism). Michael Fitts argues it is possible to view universalism as a process which ensures all individuals, including the worse off, a piece of the political pie. If this is true, Fitts argues that universalism may reduce overall resources but could still be defended as distributionally just. See Michael A. Fitts, *Is Ignorance Bliss? Imperfect Information as a Positive Influence on Political Institutions*, 88 MICH. L. REV. 917, 929 n.31 (1990).

37. See Tollison & Wagner, *supra* note 35, at 377; see also Kenneth A. Shepsle & Barry R. Weingast, *Legislative Politics and Budget Outcomes*, in *FEDERAL BUDGET POLICY IN THE 1980S* 343, 356 (Gregory Mills & John Palmer eds., 1984) (“Because public expenditures often have a

James Buchanan, a Nobel prize winner and theorist who has explored the problems associated with collective decisionmaking, has long noted that debt finance is politically attractive precisely because it enables politicians to provide a high level of public goods and services while externalizing the costs onto later generations.³⁸ Simply put, early generations are able to finance the consumption of goods and services through federal debt, which will be paid off by later generations. Buchanan notes that while countless economists have demonstrated convincingly that routine deficit finance is extremely inefficient and inequitable,³⁹ policymakers regularly convey the idea that budget deficits are unproblematic and, indeed, necessary for the stability of the economy.⁴⁰ This rationalization, as explained by Buchanan, allows politicians to provide a high level of public goods and services to the current generation at the expense of later generations who cannot vote in contemporary elections—all while claiming they act for the greater public good.

Buchanan not only argues that budget deficits are deeply problematic, but that given the choice, rational individuals would not choose this type of fiscally unconstrained government.⁴¹ Indeed, he argues that it is “impossible to construct a contractual calculus in which representatives of separate generations would agree to allow majorities in a single generation to finance currently enjoyed public consumption through the issue of public debt that insures the imposition of utility losses on later generations of taxpayers.”⁴² In short, rational individuals would not allow deficit spending because those who

significant impact on a local economy . . . the purchase of program inputs is politically valuable wholly apart from the objectives sought by the program. Put simply, economic costs become political benefits when they are appropriately targeted.”). *But see* Paul Peterson, *The New Politics of Deficits*, 100 POL. SCI. Q. 575, 585-87 (1985) (arguing that legislatures impose voluntary constraints on spending to avoid bad publicity).

38. *See* BUCHANAN & WAGNER, *supra* note 5, at 98-105 (arguing there is a democratic bias for unbalanced budgets); James M. Buchanan, *The Constitution of Economic Policy*, 77 AM. ECON. REV. 243, 250 (1987) (explaining that unbalanced budgets allow the current generation to consume at the cost of the next generation); *see also* CAROLYN WEBBER & AARON WILDAVSKY, *A HISTORY OF TAXATION AND EXPENDITURES* 434 (1985) (noting that “[t]o enable a legislator to vote for appropriation bills and at the same time avoid voting for increases in taxes is to provide him with the politicians’ paradise”).

39. For a good discussion of the various contemporary economic views on unbalanced budgets, *see* DANIEL SHAVIRO, *DO DEFICITS MATTER?* 28-150 (1997).

40. *See* BUCHANAN & WAGNER, *supra* note 5, at 37-51.

41. *See* Buchanan, *supra* note 38, at 250.

42. *Id.* Buchanan makes this same argument with regard to the taxation laws as well. He argues that because taxation generally distributes enormous gains to the few, and equally enormous losses to the many, rational individuals would not support the laws. *See* GEOFFREY BRENNAN & JAMES M. BUCHANAN, *THE POWER TO TAX: ANALYTICAL FOUNDATIONS OF A FISCAL CONSTITUTION* 32 (1980). Moreover, to the extent that taxation produces excess burdens over the revenue paid to the government, the tax transfers from citizens to politicians will not be costless. Buchanan argues that, setting risk aversion and distributional issues aside and assuming that rational individuals will reach a social contract based on their own expected returns, a rational calculus would generate an institutional setting in which pure transfers from citizens to government would be minimized given the existence of the excess burden. *See id.*

choose or vote for spending projects are not the individuals who will suffer the costs.

To understand the potential unfair burden of public debt on unborn generations, consider a hypothetical population that exists in 1936⁴³ and consists of “young,” “middle-aged,” and “old” people.⁴⁴ Each generation lasts twenty years and each person has a fixed income of \$30,000 during the twenty-year period. Assume there is no private saving and that each member of the population consumes her entire income.⁴⁵ The income levels of each group are depicted in line 1 of figure 1.

Now assume the government decides to borrow \$30,000 to finance the public goods and services it has promised to provide. The treasury bonds issued mature twenty years from the date of issue. Because the oldest members of the population will not survive to the date the bonds mature, only the young and middle-aged citizens are willing to lend to the government. Assume the young and middle-aged groups each lend \$15,000 to the government, thereby reducing their consumption by that same amount. With the money obtained from the sale of treasury bonds, the government provides public goods that benefit all three groups equally—despite the fact that only the young and the middle-aged purchased the treasury bonds in the first place. These facts are depicted in lines 2 and 3 of figure 1.

When the year 1956 arrives, the generation that was old in 1936 has passed away, the formerly middle-aged are old, the young are now middle-aged, and a new generation has been born. Because the treasury bonds have matured, the government must now raise \$30,000 to pay off the debt (assume for simplicity that the rate of interest is zero).⁴⁶ It does so by imposing a \$10,000 tax on each person which is then transferred to the bond holders as shown on lines 4 and 5 of figure 1.

Line 6 of figure 1 depicts the consequences of the government's fiscal policies. The generation that was old in 1936 has a lifetime consumption that is \$10,000 higher than it would have been without the issuance of the government debt. They received a windfall. Those who were young and middle-aged are no better or worse off with regard to their lifetime consumption because of the government policies. The young generation in 1956, however, has a lifetime consumption stream that is \$10,000 less than it would have been with-

43. I use this date because it coincides with the publication of JOHN MAYNARD KEYNES, *A GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY* (1936). James Buchanan and Richard Wagner argue it was the publication of this book that legitimated Congress's pursuit of deficit spending. See BUCHANAN & WAGNER, *supra* note 5, at 39.

44. This hypothetical is taken from HARVEY ROSEN, *PUBLIC FINANCE* 423 (2d ed. 1988).

45. See *id.*

46. The assumption that the government need only pay back the principal does not change the substantive result. Professor Rosen points out that by assuming a zero interest rate, there is no need to discount future consumption to find its present value. See *id.* at 423 & n.7.

FIGURE 1

| | Unborn (1936) | Young (1936) | Middle-aged (1936) | Old (1936) |
|---|------------------|-----------------------|-----------------------|--------------------|
| 1. Income | \$0 | \$30,000 | \$30,000 | \$30,000 |
| 2. Government borrows \$30,000 | \$0 | (\$15,000) | (\$15,000) | \$0 |
| 3. Government provides consumption | \$0 | \$10,000 | \$10,000 | \$10,000 |
| | Young (1956) | Middle-aged (1956) | Old (1956) | Deceased (1956) |
| 4. Government raises taxes to pay back debt | (\$10,000) | (\$10,000) | (\$10,000) | \$0 |
| 5. Government pays back debt | \$0 | \$15,000 | \$15,000 | \$0 |
| 6. Total loss/gain for each generation | (\$10,000) | broke even | broke even | \$10,000 |

out the government debt and taxation policies—they paid for the windfall obtained by the earlier generation. Although figure 1 is highly restrictive in the sense that it allows for no private savings, no economic growth, and no economic response to government policies, economic theorists agree it nevertheless conveys a realistic possibility of intergenerational burdenshifting.⁴⁷ The outcome also demonstrates the problems that fiscal constitutionalists have with the contemporary budgeting process, which produces budget deficits year after year. At the time the debt is issued and the public goods and services are consumed in 1936, politicians are not concerned with the future generations who will be forced to pay off the debt. The future generations could not vote and could not unseat their representatives when the unfair policy decisions were adopted. Accordingly, without a balanced budget to constrain the process, the legislature will not hesitate to impose unfair costs onto future, unborn generations.

In addition to the ability to externalize the cost of consumption onto later generations, fiscal constitutionalists note there is also a second and more indirect set of incentives that encourage legislators to engage in deficit spending. Because statutory lawmaking is subject to the “whims” of changing coalitions, it is difficult, if not impossible, to obtain permanent legislation on any single issue. Assume, for example, that a majority of elected politicians believe that budget deficits are problematic, so they vote to prohibit deficit spending. The major-

47. See *id.* at 424 (noting that more complex models indicate that cost externalization is a real possibility); see also R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 137-38 (1990) (noting that congressional members are unlikely to curtail spending projects that impose losses on future generations, which are harmless to their political aspirations, unlike current generations, which are dangerous).

ity coalition, while successful in obtaining a balanced budget mandate in the short term, is not guaranteed permanent success given that some legislators inevitably will retire and others will be unseated in future elections. The deficit-reducing legislation, therefore, is vulnerable to possible future majority coalitions who see no fiscal danger in maintaining a budget imbalance. Thus, it is not only the actions of self-interested political agents, but the structural rules of a majoritarian democracy, that arguably provide an incentive for deficit spending.⁴⁸

Accordingly, Buchanan and many others argue we must remove the budget process from the everyday statutory context into the constitutional context by adopting a balanced budget amendment.⁴⁹ A balanced budget amendment permanently would constrain Congress and the President, thereby preventing the adoption of spending programs without corresponding legislation that raises the revenue necessary to pay for the programs. In short, fiscal constitutionalists argue that, because politicians have an innate bias toward spending without taxing, we must adopt a precommitment device like the balanced budget amendment that forces the legislature to make fiscally responsible choices. The next section explains the perceived advantages of placing the budgetary decision-making process into the constitutional framework.

B. The Constitutional Solution

1. Imperfect Rationality and Binding Constraints

Given that economists ordinarily assume that the availability of choices and options increases an individual's utility level,⁵⁰ it might seem surprising that public choice theorists who call themselves fiscal constitutionalists argue for a precommitment device with regard to the budgetary process. In a regime of universalism, however, legislators make choices in the short term that appear to reduce society's overall

48. See Buchanan, *supra* note 23, at 349.

49. See BUCHANAN & WAGNER, *supra* note 5, at 180-81 (providing a detailed proposal for balancing the budget); James M. Buchanan, *Budgetary Bias in Post-Keynesian Politics: The Erosion and Potential Replacement of Fiscal Norms*, in DEFICITS, *supra* note 35, at 180, 180-96 (advocating a return to Victorian budgetary norms to promote balanced budgets). Interestingly, Buchanan and other fiscal constitutionalists fail to note the irony of their proposal. While they argue it is immoral to bind future generations through deficit spending, they do not discuss the fact that a constitutional amendment is equally binding—a constraint that future generations may not want to live under. For a good discussion of this problem generally, see HOLMES, *supra* note 7, at 134-77.

50. Buchanan recognizes that his theory of constitutional economics diverges from orthodox economic theory. He notes that in elementary economics textbook formulations of demand theory, the individual confronts a range of goods available at set prices but, at the same time, is restricted by the size of her budget. See James M. Buchanan, *The Domain of Constitutional Economics*, 1 CONST. POL. ECON. 1, 4 (1990). Economists simply assume that the consumer will purchase within her budget. Indeed, it would be bizarre for the individual consumer to deliberately constrain or limit the set of available choices or options.

welfare in the long term.⁵¹ In the context of the budget, deficit spending allows legislators to garner votes and contributions by providing voters and special interest groups with a high level of goods and services in the short term. However, fiscal constitutionalists argue that, in the long term, deficit spending unfairly externalizes the costs of consumption onto later generations, promotes inflation, and creates the threat of a federal government default.⁵² A balanced budget would arguably prevent burdening future generations with the costs of current consumption and at the same time would have a stabilizing effect on the economy.⁵³ Thus, while the balanced budget amendment will restrict legislative choice, fiscal constitutionalists argue it is a rational option to pursue given that precommitment will maximize utility over the long run.⁵⁴ Contemporary fiscal policymaking, therefore, is similar to a prisoners' dilemma or a tragedy of the commons—situations in which an individual would be better off with fewer choices and options.⁵⁵

Jon Elster argues that a perfectly rational individual would not need to resort to a precommitment device such as a balanced budget amendment.⁵⁶ According to his reasoning, a fully rational individual voluntarily would exercise the restraint necessary to obtain a balanced budget if she viewed it to be in her own best interest.⁵⁷ Yet Elster also notes that one cannot characterize an individual seeking a binding constraint as a means to control irrational impulses as simply an “irrational vehicle for . . . changing wants and desires.”⁵⁸ After all, the individual is too weak to achieve her goals and aims on her own, *but* she understands this weakness *and* seeks to overcome it. Accordingly, Elster argues, individuals seeking a precommitment should not be labeled irrational but rather “imperfectly rational.”⁵⁹

The (imperfect) rationality of the balanced budget amendment, therefore, is associated with the potential gains in efficiency and fair-

51. See BUCHANAN & WAGNER, *supra* note 5, at 167-71.

52. See *id.* at 167, 171 (explaining that “[e]xpansion in aggregate demand, accompanied by some inflation, could reduce unemployment in the short run, but only because the inflationary effects were not fully anticipated. Once the predictable effects of inflation on real wages came to be understood, permanent structural features of the economy would reassert themselves” and “[t]he inflation-unemployment spiral that results from short-sighted efforts at demand stimulation will simply increase the dissonance between people’s aspirations and their realizations”).

53. See *id.*; Buchanan, *supra* note 38, at 250.

54. See BUCHANAN & WAGNER, *supra* note 5, at 159 (“Just as an alcoholic might embrace Alcoholics Anonymous, so might a nation drunk on deficit and gorged with government embrace a balanced budget and monetary stability.”); see also JON ELSTER, *ULYSSES AND THE SIRENS* 37 (1990) (noting that individuals precommit by using binding resolutions in a number of contexts).

55. See Fitts, *supra* note 36, at 947.

56. See generally ELSTER, *supra* note 54.

57. See generally *id.*

58. *Id.* at 36.

59. See *id.*; see also HOLMES, *supra* note 7, at 152 (noting that abdication of will can increase power).

ness as well as its ability to protect the solution from changing political coalitions in the future. This article will not focus on the efficiency or fairness arguments given that these claims have been extensively explored elsewhere.⁶⁰ Instead, it will focus on the claim that a balanced budget amendment will permanently constrain the legislature. The article will also consider the broader, more theoretical, claim that fiscal constitutionalists make: that constitutions are made behind a veil of ignorance, enabling legislators to rise above their own self-interested ends.

2. *Permanence*

A number of the procedural requirements that govern constitutional rulemaking are not found in the ordinary legislative process. These additional procedural hurdles, in turn, guarantee a higher level of permanence than can be obtained through statutory law. Article V of the Constitution sets out two methods for amending the Constitution, both of which ensure the provisions have a long-term effect.⁶¹ Unlike the enactment and repeal of ordinary statutes, the process under either alternative involves a supermajority vote by decisionmakers at different levels of government. Under the first approach, Congress can propose an amendment with a two-thirds vote of both houses.⁶² The amendment is then ratified if three-fourths of all the state legislators approve it.⁶³ The second approach alleviates the role of the federal legislature by permitting the states to call a constitutional convention to propose an amendment.⁶⁴ Once the convention delegates propose an amendment, the proposal becomes a part of the Constitution if three-fourths of the state legislatures ratify it.⁶⁵ While available in theory, this second method for amending the Constitution has been called a "constitutional curiosity" because the process raises a number of difficult political questions that have not yet been resolved and because it has never been used as a means for amending the Constitution.⁶⁶

Regardless of which method is used, however, these procedural mechanisms make it extremely difficult not only to ratify an amendment but also to repeal a constitutional provision once adopted. In-

60. See, e.g., SHAVIRO, *supra* note 39, at 28-150.

61. U.S. CONST. art. V. Although Article V addresses the procedures for amending the Constitution, it leaves a number of difficult questions unanswered. See Sanford Levinson, *Introduction: Imperfection and Amendability*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICES OF CONSTITUTIONAL AMENDMENT* 3, 5-6 (Sanford Levinson ed., 1995) (enumerating various difficult and unaddressed problems with the amendment process).

62. See U.S. CONST. art. V.

63. See *id.*

64. See *id.*

65. See *id.*

66. See Charles K. Rowley, *The Constitutional Route to Effective Budgetary Reform*, in *DEFICITS*, *supra* note 35, at 391, 396-97.

deed, of more than 11,000 amendment proposals, only thirty-three have received the necessary congressional votes, and only twenty-seven have been ratified by the states.⁶⁷ Additionally, over the course of more than two centuries, the only amendment that operated to repeal a constitutional provision was the Twenty-first, which nullified the prohibition rule found in the Eighteenth Amendment.⁶⁸

The durability of the Constitution compared to that of ordinary statutes is key to the fiscal constitutionalists' argument for the balanced budget amendment. It arguably ensures that once ratified, the balanced budget mandate will permanently constrain the legislators, thereby preventing future majority coalitions from adopting unbalanced budgets. It protects the fiscal process from the changing whims of legislators who are more likely to act in their own self-interest than in the interest of society at large. Of course, as the ratification of the Twenty-first Amendment suggests, even constitutional rules are not impervious to changing political views. Yet, it is clear that constitutional provisions are far more durable than ordinary statutory law.

3. *The Veil of Ignorance*

The (imperfect) rationality of binding constraints along with the permanence of constitutional provisions suggest why we might pursue a balanced budget amendment, but neither feature explains why a self-interested legislator will vote willingly to ratify the amendment in the first place. Indeed, given that the underlying assumption of fiscal constitutionalism is that legislators are self-interested actors and deficit spending is widely perceived to advance politicians' private-regarding ends, it seems unlikely the proposed mandate will find political support.

Fiscal constitutionalists, however, argue that the features unique to constitutional provisions will encourage politicians to support a balanced budget amendment. Not only are constitutions extremely durable, but they are written in highly general terms and have universal application. These features cloud the decision-making process in the sense that it becomes virtually impossible to predict exactly how the amendments will affect specific individuals.⁶⁹ This is true because we

67. See Sullivan, *supra* note 15, at 692; see also RICHARD B. BERNSTEIN & JEROME AGEL, AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT? 169 (1993) (noting the number of unsuccessful amendment proposals); Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111, 112 (1993) (noting that the relative rarity of successful constitutional amendments is a puzzle); Stephen Holmes & Cass R. Sunstein, *The Politics of Constitutional Revision in Eastern Europe*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT, *supra* note 61, at 275, 275 ("A Constitution, among other things, is a document that is unusually difficult to change.").

68. U.S. CONST. amend. XXVII.

69. See Fitts, *supra* note 36, at 967 n.173 (arguing there is an implicit agreement to draft constitutional provisions in general terms).

do not know what our interests will be in the future. And even if we did, it would be difficult, if not impossible, to facilitate our goals and aims through broad and general constitutional language. Finally, if we were capable of advancing our long-term interests in the constitutional setting, the universal application of the rule would cause us to hesitate in undertaking this project. In short, constitutional decisionmakers appear to make choices behind a "veil of uncertainty."⁷⁰ The veil of uncertainty, in turn, transforms individuals into impartial and disinterested decisionmakers whose choices are likely to reflect "the most reasonable understanding of the public conception and its political values of justice and public reason."⁷¹ Thus, while public choice theorists generally argue that statutes are commodities purchased by groups or coalitions, fiscal constitutionalists argue that constitutional politics entail a higher form of lawmaking.⁷²

70. JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 63-84 (1962) (arguing that the uncertainty required for an individual to support public-regarding policies is present at the constitutional stage of discussion); see also BRENNAN & BUCHANAN, *supra* note 42, at 1-12 (arguing that individuals ignorant of their own position make public-regarding constitutional choices); Geoffrey Brennan, *Constitutional Constraints on the Fiscal Powers of Government*, in *CONSTITUTIONAL ECONOMICS* 119, 121 (Richard B. McKenzie ed., 1984) ("[T]he constitutional decision making involves an impartiality that is of normative value in its own right.").

71. JOHN RAWLS, *POLITICAL LIBERALISM* 236 (1993); see also JAMES M. BUCHANAN, *CONSTITUTIONAL ECONOMICS* 35 (1991) (noting that John Rawls's notion of "justice as fairness" is quite similar to his theory of constitutional economics).

72. Not only are constitutional rules likely to be considered behind a veil of ignorance and to promote the public good, but the interest group dynamic may also be completely different at the constitutional moment. Because the potential life of a constitutional rule is so much longer than the life of a statute, the costs associated with a constitutional rule will be much greater than the cost of an individual statutory rule. These costs will, in turn, provide an incentive for individuals to participate in the political process to prevent the ratification of inefficient and unfair constitutional rules. See ROBERT E. MCCORMICK & ROBERT D. TOLLISON, *POLITICIANS, LEGISLATION, AND THE ECONOMY: AN INQUIRY INTO THE INTEREST GROUP THEORY OF GOVERNMENT* 127 (1982) (arguing that because the individual voter's stake is large in the constitutional setting, there will be greater voter participation at the margin); see also Holmes & Sunstein, *supra* note 67, at 275-306 (arguing that eastern European countries should adopt durable constitutions as a mechanism for avoiding interest group politics at the constitutional level). Moreover, because the debates over constitutional amendments tend to be highly visible, the public can more easily obtain reliable information, thereby circumventing the problem of rational ignorance found in ordinary politics. See Jeffery Rosen, *Overcoming Posner*, 105 *YALE L.J.* 581, 604 (1995) (arguing that interest groups will have a "harder time dominating debates over constitutional amendments, which tend to be highly visible, where the public can more easily obtain reliable information, and where battles are fought in a series of institutionally competitive arenas"). See generally ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957) (discussing rational ignorance and the mobilization bias). Greater and more meaningful participation in constitutional debates is likely to diminish the ability of special interest groups to capture the process for their own private purposes—a problem inherent to statutory politics. In short, during periods of constitutional choice, the uninterested and diffuse public may not be all that uninterested and diffuse.

Indeed, even those who view public choice theory as a simplistic and unnuanced description of the political process note that many of the defects of the ordinary political process apply with less force during times of constitutional politics. See Rosen, *supra*, at 603-09 (arguing that public choice theory is reductive and arid but may yield a few useful insights). The process of enacting a statute often involves vote trading and strategizing, ultimately producing extremely complex legislation that reflects a variety of private aims and goals. See *id.* at 604. Because constitutions

There are key differences between fiscal constitutionalists and the contemporary political philosophers who have explored the usefulness of the veil in collective decisionmaking. The fiscal constitutionalists argue that their theory is descriptive in the sense that legislative decisionmakers are behind an *actual* veil of ignorance in the constitutional setting.⁷³ The political philosopher, John Rawls, on the other hand, views the veil of ignorance as an heuristic device for determining the structure of fair and just social institutions.⁷⁴ Rawlsian scholars, in turn, do not claim a veil of ignorance actually exists, but hypothesize one as a means for determining the detail of public-regarding policies and programs.⁷⁵ This distinction is important because the fiscal constitutionalists' argument for the balanced budget amendment will fail if the veil of ignorance does not actually exist. Without the veil, legislators will be cognizant of their own self-interests, and consideration of the balanced budget amendment will simply result in a decision that promotes the bargains struck between well-organized groups and congressional members. Thus, while Rawls asks decisionmakers to hypothesize a veil, fiscal constitutionalists argue this would be an impossible task and certainly not politics as usual.⁷⁶ Legislators, therefore, must be behind a real-world veil of ignorance if they are to rise above their narrow, private-regarding goals and aims.

A number of constitutional amendments arguably serve as evidence that constitutions are made behind a veil of ignorance. The Bill of Rights, incorporated into the Constitution as the first ten amendments, for example, imposes a number of constraints upon the federal government. Considering that rational legislators would desire complete discretion in policymaking (in order to further their own self-interested goals), the Bill of Rights might appear profoundly irrational. Yet, the amendments found widespread support at the time they were adopted.⁷⁷ Fiscal constitutionalism arguably accounts for

are written as a narrow, single text, the dangers of vote trading, sequential consideration of proposals, and unrelated riders, therefore, are all substantially reduced. *See id.* at 604-05. Moreover, the social choice problem of cyclical majorities that cannot choose among three or more mutually exclusive alternatives is less likely to materialize when a single proposal is presented to the states for a yes-or-no vote. *See id.* at 604. For a good discussion of policy cycling, see Robert P. Inman, *Markets, Governments, and the "New" Political Economy*, in 2 HANDBOOK OF PUBLIC ECONOMICS 647, 663-71 (Alan J. Auerbach & Martin Feldstein eds., 1987).

73. *See* DENNIS C. MUELLER, *PUBLIC CHOICE* 258 (1979) (noting that Buchanan's work is "strongly positivist in contrast to, say, the works of Rawls and Harsanyi").

74. *See* JOHN RAWLS, *A THEORY OF JUSTICE* 197 n.2 (1973) (noting that his theory of justice differs from Buchanan's social theory in that Rawls does not seek to provide an account of the workings of actual institutions).

75. *See, e.g.,* Mary Josephine Newborn, *The New Rawlsian Theory of Bankruptcy Ethics*, 16 CARDOZO L. REV. 111, 132-37 (1994) (exploring hypothetical choices in the context of bankruptcy policy).

76. *See* Elliott, *supra* note 14, at 1107-08.

77. *See* U.S. CONST. amends. I-X (imposing constraints on federal government); *see also infra* notes 156-63 and accompanying text (discussing widespread, although not unanimous, support for the ratification of the Bill of Rights).

legislators' support of these rules in the context of amending a constitution but not in the course of ordinary politics. Consider the Sixth Amendment.⁷⁸ Individuals motivated by personal and political gain might seek to imprison members of a particular group suspected of terrorism even though there is no significant evidence to convict the particular individuals imprisoned. In a constitutional setting, however, individuals must consider the possibility that once their opponents gain office, they too might be held without evidence of wrongdoing. Accordingly, at the time of constitutional choice, individuals are likely to favor a rule like that found in the Sixth Amendment, which mandates that everyone has a right to be charged with a specific crime and brought to a speedy and public trial by an impartial jury.⁷⁹

Jonathan Macey's analysis of agency costs also suggests that constitutional decisions are made behind a veil of ignorance.⁸⁰ He argues that constitutional documents are uniquely able to reduce agency costs given the impossibility of predicting who will benefit under the reform. He notes, for example, that, while special interest groups will benefit from wealth transfers obtained through the single-period legislative process, broad constitutional rules that facilitate rent-seeking are likely to cost each special interest group more in the long run than the group itself can expect to receive.⁸¹ According to Macey, an industry that advocates constitutional rules promoting anticompetitive behavior cannot be sure it will avoid the harm imposed on the general public through increased costs that result throughout the economy

78. U.S. CONST. amend. VI.

79. See Dennis C. Mueller, *Constitutional Rights*, 7 J.L. ECON. & ORG. 313, 322 (1991) (explaining why individuals are likely to support certain constitutional amendments). Daniel Shavero explains the problem in the context of the First Amendment. Individuals might seek to regulate and suppress certain undesirable speech through narrowly written legislation during ordinary politics. In the constitutional setting, however, individuals must consider the possibility that at some point later in time their opponents might also seek to repress speech. Accordingly, at the time of constitutional choice, individuals are likely to favor a rule like that found in the First Amendment, which reduces everyone's ability to suppress speech rather than a rule giving the politicians complete discretion to monitor information. See SHAVIRO, *supra* note 39, at 89; see also Cass R. Sunstein, *Naked Preferences and the Constitution*, 89 COLUM. L. REV. 1689, 1689 (1984) (noting that the directives found in the Bill of Rights are "focused on a single underlying evil: the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want"). See also generally Daniel Farber, *First Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554 (1991) (exploring the ratification of the First Amendment as an economic act).

80. See Macey, *supra* note 30, at 244-45 (providing brief description of the agency costs associated with a representative government). Although Macey has not written a scholarly article addressing the balanced budget amendment, he has supported its ratification. See 141 CONG. REC. S3340-41 (daily ed. Mar. 2, 1995) (open letter to Congress signed by 220 economists, including Macey, who support the balanced budget amendment).

81. See McCORMICK & TOLLISON, *supra* note 72, at 127; Macey, *supra* note 30, at 246 (stating "rules that facilitate rent-seeking generally are likely to cost each separate special interest group more in the way of wealth transfers to other groups than the group itself can expect to receive from the transfers it obtains").

due to decreased competition.⁸² Thus, special interest groups will favor narrowly tailored legislation that promotes their discrete interests, but they are unlikely to agree on broad constitutional rules that facilitate rent-seeking in general, given the uncertainty of the long-term benefits. In short, private-regarding constitutional decisions might provide short-term benefits, but those choices are also likely to backfire in the long term and thus constitute an irrational rent-seeking strategy.

Macey also points to the U.S. Constitution as evidence that constitutions are public-regarding documents.⁸³ There are a number of structural rules that diminish Congress's ability to supply legislation advancing the narrow interests of organized special interest groups.⁸⁴ The separation of governmental powers into judicial, executive, and legislative branches, for example, raises the cost of interest group legislation.⁸⁵ These increased transaction costs produce a corresponding reduction in the demand for inefficient and unfair legislation, thereby promoting the interests of the overall polity.⁸⁶ The composition of each of these government institutions also works to impede the ability of special interest groups to obtain wealth transfers at the expense of society at large. Rent-seeking activities, for example, are made far more difficult when the laws must be passed by a bicameral legislature representing two diverse constituencies.

4. *Opportunity Costs*

Finally, the economic historian Douglass North also explains why constitutions tend to be public-regarding documents. In North's theory of the state, he assumes that all rulers have rivals—either compet-

82. See Macey, *supra* note 30, at 246 ("Individual members of a particular special interest group are hurt as much as any member of the general public by any special interest legislation not specially designed to benefit their group. For example, the airline industry, which strongly advocates anticompetitive regulation for itself, is hurt as much as the general public by other protectionist regulation.").

83. Rules that limit Congress's ability to transfer wealth to discrete interest groups limit agency costs, promoting the public interest. See *id.* at 244-45.

84. See *id.* at 247-48; see also Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 493-500 (1988).

85. See Macey, *supra* note 84, at 493-500; Macey, *supra* note 30, at 247-48.

86. See Saul Levmore, *Bicameralism: When Are Two Decisions Better than One?*, 12 INT'L REV. L. & ECON. 145, 147-52 (1992) (arguing bicameralism fosters less rent-seeking and corruption than supermajoritarianism); Macey, *supra* note 84, at 499-500; Macey, *supra* note 30, at 248 (discussing the varied size of the House and Senate, the "supermajority" voting rule, and the proviso that ties the growth of the House to the growth of the population). But see W. Mark Crain & Robert D. Tollison, *The Executive Branch in the Interest-Group Theory of Government*, 8 J. LEGAL STUD. 555, 561 (1979) (arguing separation of powers may enhance opportunities for rent-seeking behavior); William Landes & Richard Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 875-76 (1975).

ing states or a potential ruler within the state.⁸⁷ If the rival does not pose a real threat, the existing ruler is free to be a despot or a dictator.⁸⁸ With a close rival at hand, however, the ruler is less free and must govern in a way that promotes the interests of her constituency.⁸⁹ In short, North argues the state is constrained by "the opportunity cost of its constituents."⁹⁰ Put differently, if possible alternatives to the current state exist, the state will find it difficult to adopt rules that impose costs upon its constituents, given that individuals will simply move to a more advantageous state when faced with unwanted government-imposed costs.⁹¹ Of course, as it becomes more difficult and costly to move, non-public-regarding rules will become correspondingly cheaper for the legislature to adopt, even in the constitutional realm.⁹²

While North's theory explains why legal rules in general might be public regarding, Jonathan Macey argues the problem of opportunity costs was precisely what motivated the Framers to adopt a constitution that sought (and succeeded) in limiting rent-seeking behavior.⁹³ Macey notes that at the time the Constitution was formed, the country was experiencing an extraordinary level of economic expansion.⁹⁴ Proponents of the Constitution argued that the national government was necessary to protect the development of the economy.⁹⁵ A key complaint underlying the demand for the new regime, according to Macey, was that the state governments were promulgating laws that benefitted narrow interests but worked to the disadvantage of the country as whole. The states, for example, had adopted legislation that significantly advantaged debtors in relation to creditors.⁹⁶ This

87. See Douglass North, *A Framework for Analyzing the State of Economic History*, 16 EXPLORATIONS ECON. HIST. 249, 250 (1979); see also Macey, *supra* note 84, at 481-82 (exploring North's theory of the state).

88. See North, *supra* note 87, at 255.

89. See *id.*

90. *Id.* at 252.

91. See *id.* at 255; Macey, *supra* note 84, at 482 (noting individuals will move to a different jurisdiction to avoid high taxes and stiff regulation).

92. See Macey, *supra* note 84, at 482.

93. See *id.* at 480-81.

94. See *id.* at 483.

95. See *id.* (noting that the defenders of the constitutional state argued that capital formation would not be possible "if an omnipotent legislature can set aside contracts ratified by the sanction of law"); see also GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-87*, at 403-09 (1969) (same).

96. See JACKSON TURNER MAIN, *POLITICAL PARTIES BEFORE THE CONSTITUTION* 59-66 (1973). The legislators generally used three methods for providing relief to the debtors. "Stay laws" allowed debtors to postpone repayment of their debt or pay through installment payments. See *id.* at 63. "Valuation laws" required creditors to accept debtors' property at a value calculated by a neutral party rather than at the value fixed by a sheriff's sale. See *id.* Finally, debtors were permitted to use paper money rather than silver or gold specie to back up debt. See *id.* at 63-66; see also James O'Fallon, *Marbury*, 44 STAN. L. REV. 219, 230-31 (1992) (noting that the paper money acts, the stay laws, and the other forms of debtor-relief legislation were viewed as "excesses of democracy" and provided the most compelling reason for calling the constitutional convention and creating a strong national government).

legislation, in turn, reduced available credit, which harmed the development of the economy. Due to the absence of banks and the scarcity of coin, individuals heavily relied upon credit as a means for engaging in economic activities.⁹⁷ The absence of credit, therefore, prevented individuals from pursuing their economic dealings and arrangements.

According to Macey, the Framers designed the new constitution to remedy these problems. It not only protected the property interest of the creditors, but it prevented the state legislators from “choking off the economic life of the states” by the use of pro-debtor legislation.⁹⁸ The new constitution did this by giving constitutional protection to private property⁹⁹ while forbidding the states from passing “Law[s] impairing the Obligation[s] of Contracts”¹⁰⁰ and granting Congress the authority to establish “uniform Laws on the subject of Bankruptcies throughout the United States.”¹⁰¹ Thus, Macey argues, the new regime produced a constitution that was far more public regarding than the existing state constitutions—just as North’s theory would predict.¹⁰² In short, the constituents moved to a new state that imposed fewer economic costs and greater economic benefits than the preexisting governing entities.

In the context of the contemporary fiscal process, the alternative regime is one that mandates a balanced federal budget. Citizens, however, not only must have an alternative governing structure in theory, but they also must be able to achieve it in practice. Otherwise, individuals are captives of the current regime and must suffer its high personal and political costs. According to the fiscal constitutionalists, the means by which citizen-taxpayers can move to the more advantageous state are found in the existing U.S. Constitution. Recall that Article V allows the states to convene a constitutional convention for the purpose of proposing an amendment.¹⁰³ This procedure raises the possibility that a more restrained fiscal process can be attained with or without the federal legislators’ approval. That thirty-two states have already filed an application for a constitutional convention to propose a balanced budget amendment suggests that balanced budgets are a viable alternative to the existing regime, which allows endless deficit spending. Indeed, the possibility of a constitutional convention may actually lead congressional representatives to choose the balanced

97. See, e.g., MAIN, *supra* note 96, at 59.

98. Macey, *supra* note 84, at 484.

99. U.S. CONST. amend. V. For a wonderful discussion of the Framers’ views and the various debates on private property, see generally JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY (1990).

100. U.S. CONST. art. I, § 10, cl. 1.

101. *Id.* art. I, § 8, cl. 4.

102. See Macey, *supra* note 84, at 484 (“In sum, the history of the birth of the Constitution is consistent with Professor North’s argument regarding the effect that rivalrous competition has on political outcomes.”).

103. See *supra* notes 61-66 and accompanying text.

budget amendment of their own volition.¹⁰⁴ As many scholars have noted, a constitutional convention has an open-ended quality in the sense that it could produce drastic measures that not only include a balanced budget amendment but many other reforms—all of which could seriously limit the federal government's power.¹⁰⁵ Accordingly, the federal legislators will have an incentive to pursue the balanced budget amendment in order to maintain as much fiscal power as possible rather than permitting the states to engage in a runaway constitutional convention.¹⁰⁶

III. THE MYTH OF THE VEIL (OR A PARTIAL VEIL OF IGNORANCE IS NOT ENOUGH)

This section returns to the claim that “‘constitutional moments [are] rare periods of heightened political consciousness’ when private citizens appear to rise up in a communitarian collectivity to press for laws that benefit society as a whole rather than narrow economic interests.”¹⁰⁷ In taking this position, fiscal constitutionalists join a long line of constitutional scholars. Although theorists such as Charles Beard and Richard Posner have viewed the Constitution as an economic document embodying the narrow interests of private actors,¹⁰⁸

104. See *supra* note 14; see also Susanna McBee, *Budget Amendment Knocks at Hill Door*, WASH. POST, Feb. 4, 1979, at A2 (noting that the threat of a constitutional convention forced Congress to adopt the 17th Amendment and could have the same effect with the proposed balanced budget amendment).

105. See, e.g., Elliott, *supra* note 14, at 1108-09.

106. The pursuit of second-best solutions is not unique to legislators and bureaucrats. Bruce Ackerman, John Millian, and E. Donald Elliott have noted that public policies imposing costs may be supported by private industries in the effort to avoid even greater costs. Various industries, for example, were persuaded to support federal environmental legislation in the late 1960s and early 1970s, even though they would have preferred to remain unregulated. The industries were persuaded to support the environmental legislation because the developing political organizations, supportive of environmental regulations, confronted them with a credible threat that an outcome even worse would come about if they did nothing. See E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 324-26 (1985).

107. See, e.g., BRUCE A. ACKERMAN, 1 WE THE PEOPLE: FOUNDATIONS 266-94 (1991) (distinguishing the “higher lawmaking” of constitutional amendment from “normal politics”); Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1022-23 (1984) [hereinafter Ackerman, *The Storrs Lectures*] (“[N]ormal politics [are] democratically inferior to the intermittent and irregular politics of public virtue associated with moments of constitutional creation.”); Elliott, *supra* note 14, at 1106-07 (stating that constitutional convention would transcend politics as usual); Fitts, *supra* note 36, at 967 (arguing constitutional amendments are considered behind a partial veil of ignorance and, as such, are more likely to be public regarding); Macey, *supra* note 84, at 484.

108. See CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (2d ed. 1935) (arguing the purpose of the Constitution was to redistribute wealth from the poor to the wealthy segments of society); Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4, 4 (1987) (viewing Beard's work as extremely narrow and exploring various constitutional provisions with a more nuanced view of economic theory). See generally Landes & Posner, *supra* note 86 (exploring the independent judiciary as a means of enhancing rather than reducing rent-seeking activities).

Beard's and Posner's works reflect two different economic approaches that theorists and scholars have used to explain constitutionalism. Posner's approach assumes that individuals are

this view is both rare and controversial.¹⁰⁹ This section argues, in agreement with Beard and Posner, that consideration of a balanced budget amendment will not occur behind a veil of ignorance and thus a decision on the issue will not necessarily reflect the interests of society as a whole. It is unlikely that either Congress or the states will ratify the amendment, and even if it is ratified, the amendment will reflect the interests of narrow private interest groups. Importantly, this article does not take the position that constitutions cannot ever be public-regarding documents; rather, it argues that constitutions are not *always* above politics.¹¹⁰

A. *The Federal Legislative Vote*

Fiscal constitutionalists claim that constitutional choices are made behind a veil of ignorance, leading to decisions based on broad and general principles of justice. This claim, in turn, rests on the fact that constitutions are long-lasting documents, written in general terms, with universal application to all citizens. Constitutional choices, therefore, are clouded by uncertainty, in the sense that one cannot attach any probabilities to the various possible outcomes of the constitutional reform.¹¹¹ Accordingly, constitutional decisionmakers are likely to adopt provisions that reduce agency costs and impose binding constraints (such as the Sixth Amendment) that inhibit the government's ability to infringe upon the freedom of private citizens.

In arguing that constitutional decisionmakers are behind a veil of ignorance, fiscal constitutionalists do not discuss the "thickness" of the veil. This feature is important because as the veil thins, so does its effectiveness in ensuring public-regarding decisionmaking. In other words, it must be assured that the legislators are behind a true veil of ignorance and not merely behind a transparent cover that enables them to pursue their private-regarding goals and aims while claiming

guided by their desire to maximize utility, while Beard's approach assumes that individuals are motivated by their class position. See BUCHANAN & TULLOCK, *supra* note 70, at 25-26 (discussing the two economic approaches to constitutionalism). Although these approaches will often overlap, some theorists argue that at certain times they will diverge. See *id.* at 26 (arguing that the second approach is in opposition to the first "since it requires that, on many occasions, the individual must act contrary to his own economic interest in order to further the interest of the social class or group to which he belongs").

109. Both Beard and Posner have been subject to extensive criticism. See, e.g., FORREST McDONALD, *WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION* (1958) (criticizing Beard); Macey, *supra* note 30, at 234-35 (criticizing Landes and Posner). See also generally Robert A. McGuire, *Constitution Making: A Rational Choice Model of the Federal Convention of 1787*, 32 AM. J. POL. SCI. 483 (1988) (challenging and supporting Beard's analysis through the use of logit analysis); Rosen, *supra* note 72 (criticizing Posner).

110. See Boudreaux & Pritchard, *supra* note 67, at 115 (arguing that "the Constitution is not above politics").

111. See Jon Elster, *Argument for Constitutional Choice: Reflections on the Transition to Socialism*, in CONSTITUTIONALISM AND DEMOCRACY 303, 315 (John Elster & Rune Slagstad eds., 1988) (stating that constitutional choice is clouded by uncertainty in that one cannot know the outcome of the reform).

they are impartial and disinterested agents in the political process. The thickness of the veil will depend on the legislators' ability to predict accurately who obtains the benefits and who suffers the costs under a balanced budget amendment. If the winners and losers are identifiable, the veil of ignorance is more myth than reality. This section explores the mythical nature of the veil.

An effective balanced budget amendment will, of course, force legislators either to reduce spending or to increase taxation.¹¹² Fiscal constitutionalists argue either approach will promote greater fairness and efficiency in the fiscal process, advancing the overall social good. While it is clear that certain individuals and interest groups will incur costs in a fiscal process that produces a balanced budget, legislators and voters cannot be sure which spending projects will be eliminated or who will suffer the tax increase to pay for the existing spending programs. In this sense, the decision to ratify the balanced budget amendment arguably will take place behind a veil of ignorance and will lead federal legislators to vote for the proposed amendment.

Yet as fiscal constitutionalists have repeatedly pointed out, one of the surest ways for congressional representatives to lose political support is to impose costs upon their constituents through tax increases or spending decreases.¹¹³ Thus, while it might be unclear *which* constituents will suffer under a balanced budget amendment, it is clear that politicians, *themselves*, will incur high costs under a regime that imposes constraints on their political freedom. Given the predictable nature of these costs, legislators will not be behind a thick veil of ignorance but only a partial veil—one that enables them to identify their own potential losses under the new regime. The question that arises, then, is whether self-interested legislators will adopt a balanced budget amendment with this knowledge in hand.

Understanding that spending cuts or taxation increases will be required under a constitutional mandate to balance the budget, legislators will pursue strategies that eliminate the potential political costs associated with the proposed budget amendment. Congress could, for example, pursue tax increases that obscure the incidence of the tax burden.¹¹⁴ Consider the income tax withholding laws, which require an employer to withhold the salaries and wages of its employees. At the time the laws were adopted, the withholding laws were widely hailed as a simplifying measure that enabled taxpayers more easily to

112. See *supra* note 49 and accompanying text.

113. See BUCHANAN & WAGNER, *supra* note 5, at 127-34.

114. See Richard E. Wagner, *Revenue Structure, Fiscal Illusion, and Budgetary Choice*, in 25 PUB. CHOICE 24, 45 (1976) (exploring various fiscal illusions); SHAVIRO, *supra* note 39, at 59 (discussing a number of fiscal illusions that Congress could use to hide taxes); Marvin A. Chirelstein, *Taxes and Public Understanding*, 29 CONN. L. REV. 9, 9 (1996) ("Taxation is a technical subject and somewhat forbidding, and that circumstance creates ample opportunities for exaggeration, distortion, false threats, and hollow promises that are difficult to counter effectively.").

pay their federal taxes.¹¹⁵ Rather than paying one lump sum at the end of the fiscal year, the withholding laws allowed taxpayers to render quarterly payments with virtually no paperwork.¹¹⁶ The laws, however, might also have enabled the taxpayers to pay taxes less painfully due to the fiscal illusion associated with withholding. Taxpayers tend to ignore the significance of withholding and often confuse the amount due or refundable upon their annual return with the amount actually paid for the year.¹¹⁷ Because the individual never receives the money withheld by her employer, she is often unaware of the true cost of the tax laws. Accordingly, politicians are able to disguise increases in tax revenues simply by adjusting the level of withholding.¹¹⁸

The social security laws are a second example of a tax program that obscures the burden of the tax. Like withholding, the social security taxes are completely withheld at the source and involve very little paperwork for the taxpayer. Moreover, because the social security laws are frequently characterized as an old-age program, the taxes are often viewed as the cost of old-age benefits and, thus, tend to be accepted more readily than the income tax.¹¹⁹ There is, however, no reason to link the social security contributions with the social security benefits. Contributors finance only a small portion of the benefits they receive at retirement, and the remaining portion is funded out of the sums paid by current workers.¹²⁰ Additionally, many people view the employer's contribution to social security as a free benefit when, in fact, the employer contribution may reduce the level of the employee's salary. In short, without ever knowing it, the employee may actually pay the full cost of the social security tax while falsely believing that she is paying just one-half.¹²¹ These fiscal illusions have led the government to rely more heavily on social security taxes than on income taxes over the past several decades. Indeed, while income taxes have remained largely stable since World War II, social security contributions have increased over 400%.¹²²

The difficulty with the use of fiscal illusions is that at some point the illusion itself may become prominent and, therefore, problematic.

115. See JAMES M. BUCHANAN, *PUBLIC FINANCE IN DEMOCRATIC PROCESS* 139 (1967).

116. See *id.*

117. See *id.*

118. See SHAVIRO, *supra* note 39, at 59.

119. See Edward J. McCaffery, *Cognitive Theory and Tax*, 41 *UCLA L. REV.* 1861, 1880-81 (1994).

120. See *id.* at 1876.

121. Edward McCaffery notes that Congress could have easily devised a tax system that requires the taxpayer to pay the full amount of the tax but that has the same overall impact. See *id.* at 1878-80 ("Economically, the standard (indeed, nearly universal) assumption is that the entire 15.3% [tax] in fact comes out of each employee's paycheck."). Cognitive theorists, however, suggest that, even if taxpayers were paid more in salary and then required to pay more in social security taxes, they would strongly resist such a system because it would impose a loss which is not experienced in the current system. See *id.*

122. See *id.* at 1880; OFFICE OF MANAGEMENT & BUDGET, *HISTORICAL TABLES: BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1997*, at 29-30, tbl.2.2 (1996).

Over the last decade, for example, theorists and commentators have begun to criticize extensively the social security laws.¹²³ Indeed, some have argued that social security is "the largest budgetary time bomb now waiting to go off."¹²⁴ In short, taxpayers may turn their attention away from the high level of public goods and view the specific tax laws as the problem.¹²⁵ When this occurs, Congress must reduce the burden associated with the tax or suffer the loss of constituency support.¹²⁶ In a world with a limited number of fiscal illusions, this strategy can only operate as a short-term measure for avoiding costs associated with tax increases.

The political costs associated with raising taxes may lead legislators to seek reductions in spending programs as a means for balancing the budget. In his book, *The Logic of Congressional Action*, R. Douglas Arnold suggests this is an alternative strategy that would enable legislators to cut spending without incurring huge political costs. He first points out that when legislators vote on individual expenditure programs, they tend to cater to the demands of the beneficiaries of the programs, given that this group is often in a position to retaliate against the representative if they are disappointed with the outcome of the vote.¹²⁷ This implies that legislators are seriously biased in

123. For a small sampling of this debate, see generally SAM BEARD, *RESTORING HOPE IN AMERICA: THE SOCIAL SECURITY SOLUTION* (1996) (exploring possibility of privatizing social security); CHARLES R. MORRIS, *THE AARP: AMERICAN'S MOST POWERFUL LOBBY AND THE CLASH OF GENERATIONS* (1996) (discussing intergenerational difficulties raised by the social security laws); PETER G. PETERSON, *WILL AMERICA GROW UP BEFORE IT GROWS OLD? HOW THE COMING SOCIAL SECURITY CRISIS THREATENS YOU, YOUR FAMILY, AND YOUR COUNTRY* (1996) (discussing the economic problems facing individuals and the state); Mary Becker, *Obscuring the Struggle: Sex Discrimination, Social Security and Stone, Seidman, Sunstein & Tushnet's Constitutional Law*, 89 COLUM. L. REV. 264 (1989) (criticizing social security laws from gender perspective); Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. L. REV. 1, 36-38 (1996) (same); Neil G. Bennett & S. Jay Olshansky, *Forecasting U.S. Age Structure and the Future of Social Security: The Impact of Adjustments to Official Mortality Schedules*, 22 POPULATION & DEV. REV. 703 (1996) (providing an empirical study of future social security benefit awards); Newton Khairi Mahammad, *Reforming the Social Security System: Can the Proposed "Means Test" Improve the System?*, 23 S.U. L. REV. 35 (1995) (same); Michael Gratz, *The Troubled Marriage of Retirement Security and Tax Policies*, 135 U. PA. L. REV. 851 (1987) (exploring possibilities for making the social security laws more distributionally fair); McCaffery, *supra* note 119, at 1932 & n.182 (noting that congressional leaders, themselves, have also begun to criticize certain hidden aspects of the social security laws); Nancy Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1596-99 (1996) (proposing that the social security laws be broadened to include housework).

124. Theodore P. Seto, *Drafting a Federal Balanced Budget That Does What It Is Supposed to Do (And No More)*, 106 YALE L.J. 1449, 1484 (1997).

125. See McCaffery, *supra* note 119, at 1930-32 (explaining that fiscal illusions work only so long, at which point taxpayers are no longer seduced by the level of public goods and begin to view the tax, the size of the government, or the deficit as a problem); Roger Noll, *The Case Against the Balanced Budget Amendment: Comments on Aranson and Rabushka*, in *THE ECONOMIC CONSEQUENCES OF GOVERNMENT DEFICITS* 201, 206 (Laurence E. Meyer ed., 1983) (arguing that voters will ignore taxation until the "general state of policy becomes so bad that even after accounting for diffuseness, it becomes important in an election").

126. See McCaffery, *supra* note 119, at 1897-1900 (discussing cognitive tricks in an age of indexing).

127. See ARNOLD, *supra* note 47, at 122.

favor of spending when faced with programmatic votes. This bias, however, can be eliminated if the spending cuts are combined into a single package and then sold as part of a formal economic policy program. According to Arnold, the bundling approach "decrease[s] the chances that citizens might blame legislators for the loss of specific benefits,"¹²⁸ instead of associating the legislative vote with the state of the overall economy. This is precisely the strategy that President Reagan pursued in the 1980s when he successfully convinced Congress to cut domestic spending. Reagan proposed a package that effectively transformed programmatic votes into votes on economic policy, thereby enabling the legislators to join him in making politically difficult budgetary decisions.¹²⁹

Although Arnold may be entirely correct when he argues that Congress is more likely to cut spending when it is presented as a package associated with macroeconomic policymaking and not as a series of votes on individual programs, he ignores a second explanation for Congress's behavior in the 1980s. Recall that public choice theory informs us that legislators are fearful of the well-organized interest groups who have the power to retaliate by withholding votes and contributions.¹³⁰ This leads Congress to supply economic rents to the organized interest groups and coalitions at the expense of the diffuse and uninformed public.¹³¹ This scenario, in turn, suggests that many congressional members will seek to cut the programs and policies that benefit the diffuse and uninformed public. Indeed, this is just what Congress did during the Reagan administration; it cut programs that funded items such as food stamps, public assistance, and subsidized housing,¹³² programs that clearly benefitted the less organized and the less powerful in society.¹³³

Public choice theory, therefore, provides us with an alternative explanation for the budget cuts of the 1980s. Moreover, it also allows us to predict with some accuracy who will suffer under the budget cuts (or tax increases) mandated by the proposed balanced budget amendment. It is not surprising, for example, that the interest groups expressing the strongest support for the balanced budget amendment are those that are large, well organized, and wealthy, such as the National Association of Home Builders, the National Association of Realtors,

128. *Id.* at 171.

129. *See id.* at 176.

130. *See supra* notes 28-37 and accompanying text.

131. *See* ARNOLD, *supra* note 47, at 122.

132. *See id.* at 178 n.41; JAMES D. SAVAGE, *BALANCED BUDGETS AND AMERICAN POLITICS* 209 (1988) ("Ronald Reagan's self-proclaimed Jeffersonian emphasis on reducing the federal government's size and scope through his social spending and tax cuts produced a Hamiltonian-like outcome, in which the burden of the budget cuts fell on lower- and middle-income Americans and the principal benefits of the tax cuts were distributed to upper-income groups.").

133. *See* ARNOLD, *supra* note 47, at 178 n.41.

and the Financial Executives, Inc.¹³⁴ At the same time, those that have written Congress in opposition to the budget amendment are far less organized and have far less money to contribute to the politicians, including the Advocates for Youth and the Coalition for Low Income Community Development.¹³⁵ In short, public choice theory, widely touted for its robust predictive powers, makes it impossible to claim that legislators will act behind a thick veil of ignorance unable to calculate the political advantages and disadvantages of various economic policies. If the balanced budget is adopted, it will advantage identifiable interest groups at the expense of diffuse, unorganized, and poor citizens.¹³⁶

At first glance, it may appear that legislators representing low-income districts stand to incur the highest costs under a regime that requires a balanced budget amendment given that the spending cuts will disproportionately harm their constituents.¹³⁷ In fact, however, all legislators will be harmed under the balanced budget mandate because it will impose limits on the net rents that can be obtained through the political process. With fiscal freedom, congressional representatives can supply endless benefits to their paying constituency, whereas budget constraints will circumscribe this ability.¹³⁸ Accord-

134. See 141 CONG. REC. S3339-40 (daily ed. Mar. 2, 1995) (letter signed by approximately 50 organizations supporting the balanced budget amendment). *But see* Jeffery H. Birnbaum, *House Rejects Bid to Require Balanced Budget*, WALL ST. J., June 12, 1992, at A2 (noting that business organizations, organized labor, and the American Association for Retired Persons opposed the adoption of the balanced budget amendment).

135. See 143 CONG. REC. S1178-79 (daily ed. Feb. 10, 1997) (letter from approximately 150 organizations opposing the balanced budget amendment); *see also* Noll, *supra* note 125, at 209 ("Unlike most of the Constitution, the proposed amendment appears to losers as the work of one faction to enhance their control of the policy outcomes of the government.").

136. The existing Constitution proves that constitutional documents will sometimes promote the private rather than the public good. The Framers of the U.S. Constitution were well aware that they were establishing a structure of government that would govern through changing times, yet they were equally aware of their own interests. Their handling of slavery, for example, reflects the politics at the time, not impartial decisionmaking behind a veil of ignorance. Behind a veil of ignorance, no rational individual would voluntarily agree to suffer the costs of slavery, so they would unanimously support a constitutional provision prohibiting involuntary servitude. See Mueller, *supra* note 79, at 322-24 (arguing that citizens will protect individual rights only when the cost to someone denied the right is relatively large *and* when there exists uncertainty on the part of the constitutional decisionmakers as to whether they will be harmed or protected by the right). The participants at the constitutional convention and those who later ratified the Constitution, however, had little uncertainty as to whether they would someday become slaves. They knew that they could never become a member of the minority who experienced the extreme costs of slavery and, therefore, had little difficulty interpreting an individual's right to freedom so as to exclude those in slavery at the time. See *id.* at 323 (discussing Framers handling of habeas corpus, slavery, and economic rights).

137. See 141 CONG. REC. H773 (daily ed. Jan. 26, 1995) (statement of Rep. Mfume) (noting that budget cuts will harm his district in particular given the low socioeconomic status of many of his constituents); *see also* ARNOLD, *supra* note 47, at 183-84 (discussing a situation in which the spending cuts affecting the least well-off in society caused legislators to lose their positions in Congress).

138. Elizabeth Garrett, however, argues there is a possibility that deficit-reducing measures may actually enhance a politician's private-regarding interests. Under a threat of forced budgetary cuts, Garrett points out organized interest groups may be forced to pay the legislature more

ingly, because fiscal freedom contributes to all legislators' ability to retain a position in Congress for literally a lifetime,¹³⁹ most politicians will have very little incentive to adopt a precommitment to balanced budgets.¹⁴⁰

Of course, legislators driven by ideological concerns alone might support the mandate despite the potential political costs of doing so.¹⁴¹ Representatives who believe the size of the federal government ought to be reduced or believe it is immoral to spend beyond one's means, for example, may support the amendment. Policy preferences attributable to ideological principles, however, are not self-serving but are altruistic and thus reflect the possibility of a publicly interested politician even in the statutory context.¹⁴² Yet fiscal constitutionalists believe that self-interest alone motivates legislative action, and the only role ideology can play in politics is to rationalize the goals and aims of particular individuals and groups.¹⁴³ The underlying premises of fiscal constitutionalism, therefore, suggest that most politicians, including ideologues, will vote to reject the proposed balanced budget amendment. In short, given that many, if not all, legislators can ex-

for benefits than they had been paid in past years. Thus it is possible the legislators "will continue to receive as much, if not more, financial rewards from organized interests while appearing to the voters to be making real headway on the federal deficit." Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. CHI. L. REV. 501, 547 (1998). Garrett's point may be correct in the short term, but is questionable in the long term. That is, if Congress threatens to cut various groups' benefits, the groups most likely will come forward with greater contributions. But the interest groups will continue to pay increasing sums only until the costs are equal to the benefits of the special legislation. There is, therefore, a limit to the level of net rents the legislators will be able to obtain. Under a regime that allows complete fiscal freedom, there is no limit because Congress will always be able to sell one more piece of legislation—albeit at a lower price than under Garrett's scenario. I thank Mark Kelman for helping to clarify my thoughts on this issue.

139. See Stephen C. Erickson, *The Entrenching of Incumbency: Reelections in the U.S. House of Representatives, 1790-1994*, 14 CATO J. 397, 418 (1995) (noting that since 1958 "professional politicians have learned how to use the power of incumbency to perpetuate their tenure in office"); Richard L. Hall & Robert P. Van Houweling, *Avarice and Ambition in Congress: Representatives' Decisions to Run or Retire from the U.S. House*, 89 AM. POL. SCI. REV. 121, 132 (1995) (arguing that congressional members are far more likely to leave the House for retirement than because of an involuntary defeat); see also SHAVIRO, *supra* note 39, at 83 (noting that 90% of the legislative members are reelected and that seniority is key for exercising influence and promoting policies).

140. A number of Republicans, including Jack Kemp and Ronald Reagan's economic advisors, shifted their views on the deficit question at this time. Jack Kemp, one of the most ardent supporters of the amendment, informed his Senate colleagues that "Republicans no longer worship at the altar of a balanced budget." SAVAGE, *supra* note 132, at 210.

141. As discussed *infra* notes 203-81 and accompanying text, however, the symbolic advantages of a balanced budget amendment may have led legislators to support an *ineffective* mandate.

142. See, e.g., PETER NAVARRO, *THE POLICY GAME: HOW SPECIAL INTERESTS AND IDEOLOGUES ARE STEALING AMERICA* 8-9 (1984).

143. See DANIEL FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 23 (1991) ("The various economic theories of legislation have in common their rejection of ideology as a significant factor in the political process."); SHAVIRO, *supra* note 39, at 98-99.

pect to incur political costs under the proposed amendment, its ratification is unlikely.

Of course, the prediction that Congress will reject any constraint on the taxing and spending powers implies that the legislature should also have refused to ratify the Bill of Rights, which imposes a variety of binding constraints upon congressional members. If the legislature had not ratified the First Amendment, for example, congressional members could have maintained their ability to repress speech, thereby keeping their opposition voiceless and increasing their own chances for reelection.¹⁴⁴ It is unsurprising, however, that federal legislators would ratify the Bill of Rights but reject the proposed balanced budget amendment 200 years later. Historians, including the public choice theorist William Riker, have noted that the interest group dynamic that existed at the end of the eighteenth century was quite different from what it is today.¹⁴⁵ This difference, in turn, explains the change in congressional choice with regard to precommitment devices.¹⁴⁶

At the time the Bill of Rights was first proposed as an amendment to the Constitution, the Constitution, itself, had not yet been ratified.¹⁴⁷ Fearful of a strong national government, the anti-Federalists had refused to ratify the document absent a Bill of Rights that would explicitly limit the federal government's powers.¹⁴⁸ Because many of the states opposed the creation of a federal government, the Framers understood there was a strong possibility that the fledgling union would not survive.¹⁴⁹ Indeed, many of the states refused to ratify the proposed constitution unless the federal government's powers were further limited by the Bill of Rights.¹⁵⁰ Accordingly, the Federalists proposed that the first Congress under the new government ratify the Bill of Rights in exchange for the states' ratification of the

144. See *supra* note 79.

145. See William H. Riker, *The Lessons of 1787*, 55 PUB. CHOICE 5, 29 (1987).

146. See Boudreaux & Pritchard, *supra* note 67, at 138 (arguing the interest group dynamic in 1789 was very different from what exists today).

147. See KYVIG, *supra* note 9, at 66-109 (tracing the politics of the amendment process).

148. See *id.* at 69-77 (exploring the source of the anti-Federalists' discontent and their strategy for amending the constitution); BERNSTEIN & AGEL, *supra* note 67, at 32 (explaining that the anti-Federalists worried the constitution authorized a government so powerful it would destroy both the states and the people); JOHN R. VILE, CONSTITUTIONAL CHANGE IN THE UNITED STATES: A COMPARATIVE STUDY OF THE ROLE OF CONSTITUTIONAL AMENDMENTS, JUDICIAL INTERPRETATIONS, AND LEGISLATIVE AND EXECUTIVE ACTIONS 19 (1994) (stating that the Bill of Rights grew out of the anti-Federalists' distrust of the central government); Riker, *supra* note 145, at 29-30 (explaining that the anti-Federalists condemned the lack of the Bill of Rights).

149. See Boudreaux & Pritchard, *supra* note 67, at 138 ("The members of the First Congress essentially were coerced into acting in a public regarding fashion. If they failed to produce a credible Bill of Rights, there was a real threat that the fledgling union would collapse, thus eliminating all possibilities for future rent-seeking at the federal level.").

150. See BERNSTEIN & AGEL, *supra* note 67, at 32-33; KYVIG, *supra* note 9, at 69-77; Riker, *supra* note 145, at 30-31.

proposed Constitution.¹⁵¹ The incorporation of the Bill of Rights, therefore, secured the support of the anti-Federalists by ensuring the federal government would be constitutionally constrained in a number of ways.¹⁵² In short, at the time the Bill of Rights was incorporated into the Constitution, the states represented a stronger and more unified interest group and were strategically placed to prevent the continued development of the new federal government.¹⁵³ The federal government, on the other hand, was a weak and almost nonexistent interest group.¹⁵⁴ Consequently, it is no surprise that the states could propose to and succeed in limiting the powers of the federal government in 1791.

This scenario also fits with North's theory of politics.¹⁵⁵ The states offered a viable alternative to the proposed federal government, giving the anti-Federalists the ability to exit if the new regime failed to accommodate their concerns. Moreover, if the Framers had ignored the interests of the anti-Federalists, the latter could have prevented the union from ever achieving political success. This account suggests that the Framers did not have complete control over the transition and were, therefore, forced to include the Bill of Rights into the new constitution even though many were opposed to it.

Once the federal government was securely in place, however, the interest group dynamic changed. Federal legislators became a far more coherent group, capable of protecting their own interests and their own base of power. Because the Constitution itself gives the federal legislators a key role in the amendment process, they are now strategically placed to ensure that no amendment operates to reduce their power.¹⁵⁶ A number of constitutional theorists have noted that the post-1791 amendments have generally not worked to diminish the federal government's power, indicating that the federal legislators will exercise their constitutional decision-making powers in a manner that

151. See KYVIG, *supra* note 9, at xvi (stating that the first 10 amendments have commonly been considered "more as steps completing the act of creation rather than as reforms of an existing structure").

152. See, e.g., Riker, *supra* note 145, at 30-31 (explaining that amendments were essential for the ratification in many of the states); Sullivan, *supra* note 15, at 692 ("The first ten amendments, the Bill of Rights, were added in one fell swoop by the First Congress and ratified in 1791 as part of a bargain that had induced reluctant states to ratify the Constitution."); Boudreaux & Pritchard, *supra* note 67, at 138 (arguing the members of the First Congress were coerced into accepting the Bill of Rights); FORREST McDONALD, *E PLURIBUS UNUM: THE FORMATION OF THE AMERICAN REPUBLIC, 1776-1790*, at 351-52 (1979) (same); JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 289-338 (1996) (tracing the debates over the Bill of Rights from the time it was proposed to the time it was ratified).

153. See Boudreaux & Pritchard, *supra* note 67, at 132-37 (arguing the ratification of the Bill of Rights was due to the strength and organization of state government actors who played on the popular fear that federal politicians might act contrary to the interests of the people).

154. See *id.*

155. See *supra* notes 87-160 and accompanying text discussing North's theory of the state.

156. Article V of the Constitution, however, also permits the states to call a constitutional convention. See *infra* notes 177-81 and accompanying text.

protects their own self-interests.¹⁵⁷ Indeed, the amendment process has not only worked to protect the existing powers of the federal government, but many of the amendments have expanded the powers of the national government.¹⁵⁸

Consider, for example, the adoption of the Sixteenth Amendment, which provides that Congress has the power to "lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."¹⁵⁹ Prior to the adoption of the Sixteenth Amendment, Congress's power to tax was limited by Article I of the Constitution, which mandated that "[n]o Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."¹⁶⁰ While the meaning of Article I was widely disputed throughout the nineteenth century, the Supreme Court interpreted it in 1895 as requiring the federal government to impose tax burdens proportionate with each state's population.¹⁶¹ With the adoption of the Sixteenth Amendment in 1913, the proportionality require-

157. The two amendments that appear to reduce Congress's power are the Eleventh and Twenty-seventh. The Eleventh Amendment, ratified in 1794, provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. Although the Amendment is unquestionably a declaration of state's rights, it was not perceived as such. See KYVIG, *supra* note 9, at 114 (noting that "[n]early every state quickly and overwhelmingly ratified" the amendment, including the Federalists). As David Kyvig notes, "Given the endorsement of the amendment by federalists committed to establishing strong credit and central power, it is hard to believe that those voting for the Eleventh Amendment saw it as either a debt avoidance measure or a major reclaiming of state authority." *Id.* The Twenty-seventh Amendment, ratified in 1992 but proposed in 1789, provides that "[n]o law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened." U.S. CONST. amend. XXVII. This Amendment limits a legislator's power to raise her own salary but only for a brief period of time. Indeed, legislators viewed their vote to ratify the Amendment as a painless way to demonstrate fiscal responsibility. See KYVIG, *supra* note 9, at 461-67 (describing the 200-year ratification process of the Amendment and noting that it has very little ability to constrain the political process); see also VILE, *supra* note 148, at 15-29 (surveying the amendments and noting the effect each had on the status quo); Bruce Ackerman, *Higher Lawmaking*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT*, *supra* note 61, at 63, 78 (noting that with the adoption of the Fourteenth Amendment, the fundamental character of the country "shift[ed] toward nation-centered patterns of higher lawmaking"); Boudreaux & Pritchard, *supra* note 67, at 140-52 (discussing the Amendments and arguing that with few or no exceptions they either enhanced the powers of the federal government or were politically neutral); Sullivan, *supra* note 15, at 692-93 (briefly discussing the substance of the 27 Amendments).

158. See *infra* notes 159-61. A number of the amendments were viewed as seriously expanding the power of the federal government including the Thirteenth, Fourteenth, and Fifteenth Amendments. See Stephen Griffin, *Constitutionalism in the United States: From Theory to Politics*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT*, *supra* note 61, at 37, 50 (noting that while the Civil War Amendments had great potential for expanding national authority, the potential was reduced by the profound localism and antigovernment attitudes typical of 19th century politics).

159. U.S. CONST. amend. XVI.

160. *Id.* art. I, § 9, cl. 4, *amended by id.* amend. XVI.

161. See *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 620-21 (1895) (striking down a federal income tax as geographically biased); see also Nancy Staudt, *The Hidden Costs of the*

ment was repealed, and Congress was freed to adopt any type of tax, regardless of the biases hidden within its structure.

Fiscal constitutionalists might argue, however, that the limited number of constraints imposed upon Congress is related to the fact that such constraints will only be accepted if they are in the public interest. In other words, one of the fundamental reasons for imposing constraints upon the government is to prevent state actors from pursuing harmful policies in the future. For example, while we may want to imprison our enemies, we do not want to be imprisoned ourselves. This fear leads us to adopt long-term constraints on all government agents, even though the constraints may harm our own short-term interests. Moreover, while legislators might anticipate costs, they also understand that the voters may unseat them from their positions in Congress,¹⁶² or they may voluntarily retire to return to the private sector at some point in their careers.¹⁶³ As a member of the general polity, the former politician will then have a different view of the federal government's unconstrained fiscal powers and the deficit finance measures she currently pursues, much as we have a different view of false imprisonment when our enemies are in office. Voted out or retired from political office, the former legislator will now be a member of the diffuse public who suffers the costs associated with the political process that enables Congress to pursue narrow legislation that works only to the benefit of special interest groups. Not wanting to suffer these costs, the politician-turned-citizen will support precommitment devices like the balanced budget amendment.¹⁶⁴

Although it is argued the balanced budget amendment might reduce special-interest legislation, thereby producing public savings, this argument ignores the public costs associated with the amendment. As fiscal constitutionalists have endlessly pointed out, unconstrained deficit spending allows citizens to get "something for nothing."¹⁶⁵ It allows the government to provide a high level of goods and services and at the same time to externalize much of the cost onto later generations. By forcing the current generation to pay the costs of its own consumption, consumption (or at least its utility) will decrease. Thus, while deficit spending might raise serious questions about fairness, it is not at all clear that deficit spending fails to provide benefits to the current generation. Indeed, the claims with regard to intergenera-

Progressivity Debate, 50 VAND. L. REV. 919, 935 n.39 (1997) (discussing the scholarly and popular debate around the *Pollock* case and the early federal income tax).

162. See SHAVIRO, *supra* note 39, at 83 (noting that 10% of politicians fail to get reelected).

163. See Hall & Van Houweling, *supra* note 139, at 183 (noting that approximately 12% of legislators retired in 1992).

164. See Macey, *supra* note 30, at 246-47 (explaining that individuals rationally object to generalized constitutional provisions that promote or enable rent-seeking activities).

165. BUCHANAN & WAGNER, *supra* note 5, at 178. Buchanan, however, argues that the free lunch is not as free as taxpayers seem to think. Unconstrained taxing and spending increases consumption, thereby exacerbating inflation. Inflation, in turn, imposes hidden costs. See *id.*

tional inequity are derived from the very existence of these advantages.¹⁶⁶

Fiscal constitutionalists cannot have it both ways. They cannot simultaneously argue that deficit spending allows self-interested individuals to externalize the costs of consumption onto later generations and that it is in the citizen-taxpayer's self-interest to halt this process through a balanced budget mandate. The balanced budget amendment is either in the interest of voters and legislators or it is not.¹⁶⁷

Of course, advocates of the balanced budget amendment might reconcile this inconsistency by pointing out that the current generation may, in fact, experience both advantages and disadvantages at the same time under contemporary budget policymaking. That is, the benefits of deficit spending might be circumscribed by both inflation and the overall costs incurred under a regime of universalism. This insight, however, does not necessarily lead to the conclusion that it is in the interest of citizen-taxpayers to support a balanced budget amendment. Instead, this conclusion rests on a cost-benefit analysis that would most likely prove to be indeterminate.¹⁶⁸

More important, in the context of the budget, the damage has already been done and cannot be repeated. In other words, the previous generations have already externalized the costs of their consumption onto the present generation. And, while there is inevitably some overlap between the generations, as older individuals pass away, they obviously become incapable of further externalizing costs. In short, the generation considering the balanced budget amendment does not have the same fears that the constitutional decisionmakers had while considering the Sixth Amendment. More to the point, if the false imprisonment had already taken place and could not be repeated, the Framers would have been irrational to adopt a rule like the Sixth Amendment. Similarly, it would be irrational to adopt a precommitment to balanced budgets when it will not alleviate costs but will

166. See Buchanan, *supra* note 38, at 250 (discussing the intergenerational fairness problems that should lead to ratification of the balanced budget amendment).

167. Jonathan Macey notes that public choice theorists have made similarly inconsistent arguments in the past. He notes that Professor Tollison argues that the judiciary is *independent*, thereby increasing the durability of interest-group bargains, while also arguing the judiciary is *dependent* upon the legislature. See Macey, *supra* note 84, at 497-98 (arguing the inconsistency leads one to conclude that the judiciary, in fact, does not favor interest group activity).

168. The idea that deficit spending imposes immediate economic hardship is widely disputed. See, e.g., SAVAGE, *supra* note 132, at 210-11 (discussing economic theorists' view that deficit spending has not had an effect on inflation, demand, or money growth); see also Symposium, *Keynesian Policies, the Drift into Permanent Deficits and the Growth of Government*, 4 J. MONETARY ECON. 569-636 (1978) (debating the validity of the fiscal constitutionalists' view of deficit spending).

prevent the voting generation from obtaining the future benefits of public borrowing.¹⁶⁹

Recall figure 1, which suggests that the hypothetical young generation in 1956 loses \$10,000 due to the government policies that provided an earlier generation with a windfall. Fiscal constitutionalists suggest this type of policy is immoral because individuals are forced to incur costs without any corresponding benefits, a situation they would not choose behind a veil of ignorance. The problem with figure 1 is that it is a static depiction of the young generation's position. In a more dynamic setting, it becomes clear that while the individuals who were young in 1956 incur a \$10,000 loss, by the time they are deceased in 2016, they will have received a \$10,000 windfall. The bold numbers in figures 2, 3, and 4 trace the effects of deficit spending on this generation throughout its entire life cycle.

Together figures 1, 2, 3, and 4 demonstrate why the voting generation would refuse to support a balanced budget amendment. A generation that chooses such a mandate would leave itself in the

FIGURE 2

| | Unborn (1956) | Young (1956) | Middle-aged (1956) | Old (1956) |
|---|------------------|-----------------------|-----------------------|--------------------|
| 1. Income | \$0 | \$30,000 | \$30,000 | \$30,000 |
| 2. Government borrows \$30,000 | \$0 | (\$15,000) | (\$15,000) | \$0 |
| 3. Government provides consumption | \$0 | \$10,000 | \$10,000 | \$10,000 |
| | Young (1976) | Middle-aged (1976) | Old (1976) | Deceased (1976) |
| 4. Government raises taxes to pay back debt | (\$10,000) | (\$10,000) | (\$10,000) | \$0 |
| 5. Government pays back debt | \$0 | \$15,000 | \$15,000 | \$0 |
| 6. Total loss/gain for each generation | (\$10,000) | broke even | broke even | \$10,000 |

169. The federal budget is remarkably similar to a ponzi scheme in which all investors come out ahead as long as the scheme continues. See SHAVIRO, *supra* note 39, at 308 (highlighting the similarity between the federal budget and ponzi schemes). Ponzi schemes, named for the swindler Charles Ponzi, are schemes which guarantee investors a high return on their investment. See Max P. Liphart, *Crime in the Suites*, 13 AM. BANK. INST. J. 13, 28 (1994). The investors, however, are not paid off through market gains but through the monies obtained from additional investors. See *id.*; *Jobin v. McKay (In re M & L Bus. Mach. Co.)*, 84 F.3d 1330, 1332 n.1 (10th Cir. 1996) (explaining that a ponzi scheme is an investment scheme in which returns to investors are financed through new investors rather than the success of the underlying business). This pyramid builds upon itself until ultimately no more investors are found, at which point the scheme falls apart. See SHAVIRO, *supra* note 39, at 308 (explaining that while, in principle, ponzi schemes could go on forever, in practice they never do). Similarly, investors in treasury bonds are guaranteed a certain return and then are paid off through the funds obtained through additional investors in later generations. See *id.*

FIGURE 3

| | Unborn (1976) | Young (1976) | Middle-aged (1976) | Old (1976) |
|---|------------------|-----------------------|-----------------------|--------------------|
| 1. Income | \$0 | \$30,000 | \$30,000 | \$30,000 |
| 2. Government borrows \$30,000 | \$0 | (\$15,000) | (\$15,000) | \$0 |
| 3. Government provides consumption | \$0 | \$10,000 | \$10,000 | \$10,000 |
| | Young (1996) | Middle-aged (1996) | Old (1996) | Deceased (1996) |
| 4. Government raises taxes to pay back debt | (\$10,000) | (\$10,000) | (\$10,000) | \$0 |
| 5. Government pays back debt | \$0 | \$15,000 | \$15,000 | \$0 |
| 6. Total loss/gain for each generation | (\$10,000) | broke even | broke even | \$10,000 |

FIGURE 4

| | Unborn (1996) | Young (1996) | Middle-aged (1996) | Old (1996) |
|---|------------------|-----------------------|-----------------------|--------------------|
| 1. Income | \$0 | \$30,000 | \$30,000 | \$30,000 |
| 2. Government borrows \$30,000 | \$0 | (\$15,000) | (\$15,000) | \$0 |
| 3. Government provides consumption | \$0 | \$10,000 | \$10,000 | \$10,000 |
| | Young (2016) | Middle-aged (2016) | Old (2016) | Deceased (2016) |
| 4. Government raises taxes to pay back debt | (\$10,000) | (\$10,000) | (\$10,000) | \$0 |
| 5. Government pays back debt | \$0 | \$15,000 | \$15,000 | \$0 |
| 6. Total loss/gain for each generation | (\$10,000) | broke even | broke even | \$10,000 |

disadvantaged position of the young generation in 1956 depicted in figure 1—a group which has no ability to borrow but maintains the obligation to repay earlier generations' debts. The economic advantages depicted in figures 2, 3, and 4 would be lost forever. Stated to reflect the reality of more than fifty years of public borrowing rather than just two periods in which one generation gains and the other loses, it is clear that rational individuals will support deficit spending. Thus, when fiscal constitutionalists argue that no rational individual

170. See Buchanan, *supra* note 38, at 250.

would allow deficit spending,¹⁷⁰ they fail to consider the context in which the balanced budget amendment would, *in fact*, be considered.

Indeed, the current generation's economic situation worsens as more details of the balanced budget amendment are explored. Not only will the proposed balanced budget amendment force the current generation to pay the costs of previous generations' consumption with no ability to borrow themselves, it will also force them to pay a portion of many future generations' consumption. This occurs because the budget proposals have prohibited public borrowing to pay for capital expenditures, such as interstate highways and government buildings, expenditures which provide economic benefits to future generations.¹⁷¹ The use of public debt to pay for capital expenditures would distribute the cost of the long-lasting goods, among all the beneficiaries throughout time. Congress has rejected this approach, however, presumably because it fears that maximizing politicians will characterize all goods as capital goods, thereby rendering the balanced budget amendment entirely ineffective.¹⁷² While the legislators' concerns may be warranted, the outcome nevertheless imposes huge costs onto the current generation. Assuming that rational individuals are not motivated by altruism toward either past or future generations, as most fiscal constitutionalists assume, it is extremely unlikely they will vote to stop deficit spending.¹⁷³

Perhaps, it would be possible to develop a transitional policy or program that alleviates some of the costs incurred by the generation that considers the balanced budget amendment, thereby enhancing support for the provision. For example, the voting generation may support a proposal that allows the debt to be rolled over from one generation to the next. This approach would force each generation to pay the costs of servicing the debt but not the cost of the principal itself.¹⁷⁴ Indeed, future generations need not ever retire the debt but

171. See S. REP. NO. 105-3, at 47 (minority views of Senators Leahy, Kennedy, & Feingold) (discussing the prohibition of using debt to pay for capital expenses).

172. Alternative accounting procedures have been proposed to Congress. See WILLIAM A. COX ET AL., A BALANCED BUDGET CONSTITUTIONAL AMENDMENT: ECONOMIC ISSUES 18-21 (Congressional Research Serv., Dec. 1994) (proposing various methods for treating capital expenditures under a balanced budget mandate).

173. Buchanan, of course, need not prove that the balanced budget amendment provides affirmative gains. Rather the losses under the balanced budget mandate must simply be less than the losses under the budget derived under a process of complete fiscal freedom. Buchanan might argue that while the proposed balanced budget will prevent individuals from consuming without paying, it will alleviate inflation costs and agency costs. See BUCHANAN & WAGNER, *supra* note 5, at 182-85 (discussing the economic advantages of balanced budgets). The market costs associated with unbalanced budgets, however, are highly contestable. Indeed, most economists agree that unbalanced budgets impose *no* serious economic costs. See SAVAGE, *supra* note 132, at 161-62 (noting that most serious economists believe that the deficits incurred in the 1970s and 1980s did little harm to the economy).

174. Although as Dan Shaviro notes, "[A] perpetual stream of market interest payments to finance federal borrowing would have, by definition, the same economic value as immediate repayment of the loan principle." SHAVIRO, *supra* note 39, at 132.

can endlessly refinance it. A policy of refinancing the debt, in effect, transforms the issue of who should pay the debt to one of who must incur the cost of the interest payments. This type of transitional policy would certainly reduce the costs of paying off a previous generation's debts, but it would not eliminate the cost of servicing the debt, which amounted to \$344 billion in 1996,¹⁷⁵ and more important, would prevent the current generation from externalizing the costs of its own consumption. Again, it is far from clear why self-interested legislators and voters would constrain this ability unless it is for altruistic purposes.

In sum, the proposed balanced budget amendment has little chance of ratification in the federal legislature. Politicians and voters will clearly understand the costs associated with the budget mandate and will vote with their own interests in mind, even if they believe the amendment will advance the interests of later generations.¹⁷⁶ Fiscal constitutionalists' policy prescription for irresponsible, inefficient, and unfair fiscal policymaking is an ideal that does not stand up under their own political and economic theory.

The next section explores the possibility of obtaining a balanced budget amendment through a constitutional convention called by the states.

B. The Constitutional Convention

Article V of the Constitution allows the states to call a constitutional convention, which, if held, would bypass the need for federal legislators to support the proposed balanced budget amendment. Specifically, Article V provides that "on the Application to the Legislature of two-thirds of the several states, [Congress] shall call a convention for proposing Amendments . . . which shall be valid to all Intents and Purposes as Part of this Constitution when ratified by the Legislatures of three-fourths of the several states." If the states satisfy the filing requirement,¹⁷⁷ Article V effectively eliminates the federal

175. See 143 CONG. REC. S1154 (daily ed. Feb. 10, 1997) (statement of Sen. Hatch).

176. See WEBBER & WILDAVSKY, *supra* note 38, at 493 (discussing the politics around balancing the budget throughout the 1980s). See generally SAVAGE, *supra* note 132 (discussing balanced budget politics over the course of the last two centuries). For two journalists' discussion of the political failure of the balanced budget amendment, see generally GEORGE HAGER & ERIC PIANIN, *MIRAGE: WHY NEITHER DEMOCRATS NOR REPUBLICANS CAN BALANCE THE BUDGET, END THE DEFICIT, AND SATISFY THE PUBLIC* (1997).

177. While perhaps clear on its face, the amending clause raises a number of difficult political questions. It is unclear, for example, whether Congress has the power to impose an expiration date upon each state's application requesting a constitutional convention. If each filing is constantly in danger of being rejected by a hostile Congress, it becomes far more difficult to obtain the requisite number of votes to call a convention. The federal legislators argue that they have authority to make such decisions on timeliness under the Supreme Court case, *Coleman v. Miller*, which held that the validity of state acts under Article V is a political question for Congress and not the courts to decide. See *Coleman v. Miller*, 307 U.S. 433, 454 (1939). If the federal government can effectively intervene through the imposition of burdensome filing re-

legislature from having any role in the constitutional convention.¹⁷⁸ Indeed, the Framers specifically designed this method for amending the Constitution as the means for preventing Congress from maintaining absolute power over the amending process.¹⁷⁹ Historical records of the debates taking place at the Philadelphia convention indicate that George Mason and others worried that giving absolute power to a single political body would facilitate oppressive governing and, at the same time, might prevent the ratification of public-regarding amendments.¹⁸⁰ In short, it was believed that "Congress could not always be trusted to do what was best for the country, and when it was a practice of Congress itself that gave rise to the need for amendments [as in the contemporary budgeting process], some other body should be made available to the people to initiate changes to the Constitution."¹⁸¹

Article V, in effect, makes it possible for citizen-taxpayers to move to an alternative fiscal regime without the approval of the existing federal legislators. Not only does the constitutional convention eliminate the role of Congress, but some argue it is the only means for restructuring fiscal institutions that are comprised of self-interested actors. E. Donald Elliott, for example, notes that because the convention will be called only in "extraordinary circumstances to deal with a momentous national problem,"¹⁸² the setting will ensure that the convention delegates understand the historical significance of their action and this will encourage them to transcend the narrow self-interested politics that exist in ordinary times. While it is certainly accurate to describe the convention as an important historical moment, it is far from clear that this alone will motivate the delegates to set aside their own interests to act for the greater public good. This description also conflicts with fiscal constitutionalism, which holds that public-regarding behavior is driven by the existence of a veil of ignorance and not simply by a setting "rich with history and tradition."¹⁸³

Elliott acknowledges the importance of the veil and argues the constitutional convention will come as close as possible to duplicating the conditions of Rawls's veil of ignorance.¹⁸⁴ He bases this claim on the fact that the convention delegates will not necessarily be congressional representatives, so they will not have the same personal and

quirements or other onerous demands on the process, the likelihood of a state constitutional convention decreases. See Kyvig, *supra* note 11, at 110.

178. For a discussion of the role of popular voters in the constitutional convention, see generally Note, *The Unconstitutionality of Voter Initiative Applications for Federal Constitutional Conventions*, 85 COLUM. L. REV. 1525 (1985) (arguing constitutional conventions may not be called on the basis of popular votes).

179. See Elliott, *supra* note 14, at 1080-86.

180. See 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 110-14 (M. Farrard ed., 1966).

181. Elliott, *supra* note 14, at 1085.

182. *Id.* at 1106.

183. *Id.*

184. See *id.* at 1108.

political stakes in the outcome of the vote at the convention. Put differently, state representatives will not be harmed by the constraints imposed by a balanced budget mandate in the way that federal legislators might suffer and, therefore, will be more likely to vote affirmatively on the issue.¹⁸⁵ Moreover, Elliott notes that the convention delegates will frame the discussion at a high level of generality. There will be no discussion of narrow issues such as "how much to cut farm subsidies or social security next year,"¹⁸⁶ but only a debate about abstract fiscal and institutional rules.¹⁸⁷ A decision-making process that focuses on broad and general rules will, in turn, make it difficult to discern who will win or lose under any proposed procedural change. Thus, the amendment-proposing convention has an open-ended character in the sense that it is unclear exactly what substantive rules will be proposed. In short, "it is impossible to predict in advance exactly where such a re-evaluation [of the fiscal process] might lead."¹⁸⁸

Unlike most fiscal constitutionalists, Elliott's argument does not imply that the constitutional process is always above politics. To the contrary, his argument suggests that the federal legislature will not act for the public good even in the constitutional context, leaving a constitutional convention as the only means possible for securing a balanced budget amendment. Unfortunately, Elliott's theory of constitutionalism rests on a flawed foundation. In particular, like the fiscal constitutionalists, he overstates the case that a constitutional convention will take place behind a veil of ignorance, free of politics as usual.

Elliott's first argument, that the convention delegates, unlike congressional representatives, will have no personal or political stake in the convention outcome (except to the extent the two groups overlap), rests on the idea that because the federal legislature will be responsible for undertaking tax increases or spending decreases, only they stand to incur the political costs associated with a balanced budget amendment. This argument ignores the reality of federalism and the federal government's ability to encroach opportunistically upon state authority. A constitutional amendment that constrains the fiscal powers of the federal government (regardless if proposed by the federal legislators or the delegates at the state convention) may lead federal legislators to shift responsibility for federal programs back to the state and local governments.¹⁸⁹ Indeed, subnational governments have long feared that if forced to balance the federal budget, Congress

185. While Elliott does not support a balanced budget amendment, he does support a constitutional convention. *See id.* at 1104.

186. *Id.* at 1107.

187. *See id.* at 1107-08.

188. *Id.* at 1108.

189. *See* SHAVIRO, *supra* note 39, at 239.

would do so by shifting to the states the obligation to continue services previously provided by the federal government.¹⁹⁰

Congress could accomplish this burdenshifting through the use of unfunded mandates—requirements imposed upon lower-level governments to provide a public service that they would not otherwise have provided or would have offered in a less costly fashion.¹⁹¹ A number of political theorists and tax scholars have noted that maximizing politicians use unfunded mandates as the means for dispensing political and economic benefits without incurring the costs associated with the spending policy or program.¹⁹² Indeed, much like deficit spending, unfunded mandates afford federal legislators the opportunity to cater to constituents while externalizing costs onto state and local governments.

Initially, it might appear that state and local taxpayers will see through the scheme, identifying the federal legislators as the source of the problematic tax increase. Professor Kathleen M. Sullivan, for example, has argued that in adopting the Brady law, requiring local law enforcement officers to run background checks on handgun purchasers, Congress bears the brunt of any public disapproval or criticism of the policy.¹⁹³ “If a handgun purchaser does not like the background check,” she argues, “it is clear that Congress, not the sheriff, is to blame.”¹⁹⁴ While Sullivan’s claim is certainly plausible, it is far from clear that taxpayers will understand that the federal government is also indirectly responsible for the tax hike associated with the policy. Tax increases associated with federal policies are not easily traceable by unsophisticated voters who perceive local representatives as having the exclusive authority to make decisions with regard to state and local taxes.¹⁹⁵ Indeed, local officials who seek to attribute the cost of tax increases to federal legislators tend to appear disingenuous to the voters—like children attempting to shift responsibility for their bad behavior onto others.¹⁹⁶ Not only must the subnational governments suffer the political costs of tax hikes, but they also have a difficult time opposing unfunded mandates. Opposition is politically dangerous given that the lower level governments rely upon the federal legislature for grants and other economic assistance. Criticism of specific

190. See Edward A. Zelinsky, *The Unsolved Problem of the Unfunded Mandate*, 23 OHIO N.U. L. REV. 741, 741 (1997). For a discussion of unfunded mandates generally, see Edward A. Zelinsky, *Unfunded Mandates, Hidden Taxation, and the Tenth Amendment: On Public Choice, Public Interest, and Public Services*, 46 VAND. L. REV. 1355, 1366 (1985) [hereinafter Zelinsky, *Unfunded Mandates*].

191. See Zelinsky, *Unfunded Mandates*, *supra* note 190, at 1366.

192. See, e.g., *id.* at 1369.

193. See Kathleen M. Sullivan, *The Balance of Power Between the Federal Government and the States*, in NEW FEDERALIST PAPERS: ESSAYS IN DEFENSE OF THE CONSTITUTION 111, 111-21 (Alan Brinkly et al. eds., 1997).

194. *Id.* at 119.

195. See Zelinsky, *Unfunded Mandates*, *supra* note 190, at 1374-75.

196. See *id.* at 1387.

federal legislators who support the unfunded mandate could lead the representative to retaliate by withdrawing support for state aid.¹⁹⁷ Contrary to Elliott's argument, state delegates, like the federal legislators, will have a substantial personal and political stake in the outcome of the constitutional convention.¹⁹⁸

The discussion of unfunded mandates also calls into question Elliott's second claim that the state delegates will be unable to predict the outcome of the constitutional convention. While it is true that the precise detail of the legislative changes sparked by a constitutional mandate to balance the budget cannot be predicted, Elliott overstates his case when he suggests this uncertainty will ensure that the states will support a restructuring of the federal fiscal process. However unpredictable the details of the legislative changes are, state and local officials cannot afford to deny the reality that the changes are likely to produce decreased federal economic assistance along with increased responsibility for federal policies and programs. Indeed, given the inevitability of economic harm, the states would be far more rational to reject the call for a constitutional convention. After all, in the current regime, the federal government incurs the political costs of maintaining an unbalanced budget while the states are able to reap the benefits.

This analysis, of course, assumes that the state delegates will be representatives from the state and local governments, all of whom presumably have an interest in preserving their political positions. It is not clear, however, just how the state delegates will be chosen. Article V does not address this issue, and scholars and commentators have competing viewpoints on the question.¹⁹⁹ On the one hand, the resolution of the issue is important because if the delegates are not representatives from either the federal or state legislatures, then support for the balanced budget amendment may dramatically increase at a constitutional convention. On the other hand, there are two problems with the assumption that the identity of the delegates will determine the success of the balanced budget amendment. First, as discussed in the last section, it is not likely that citizen-taxpayers will support an effective balanced budget amendment given the fact that the voting generation will be forced to pay the cost of both previous and future generations' consumption with no ability to borrow themselves.²⁰⁰ Second, even if citizen-taxpayers do want a balanced budget amendment, the constitutional convention does not alleviate the role

197. See *id.*

198. See KYVIG, *supra* note 9, at 446 (arguing states will not ratify due to fear of losing access to federal money).

199. See, e.g., Elliott, *supra* note 14, at 1107 n.106 (noting that the delegates at the 1787 convention were selected by the state legislators while Congress has proposed that the delegates be popularly elected); Rowley, *supra* note 66, at 399 (arguing the state legislatures will be free to select representative delegates and predicting the senior statesmen in each state will serve).

200. See *supra* notes 165-73 and accompanying text.

of the state legislatures. Article V empowers the convention delegates to *propose* an amendment, but the proposal must then be ratified by three-fourths of the state legislatures. In short, the constitutional convention does not eliminate the participation of legislators who will have personal and political stakes in the amendment process.²⁰¹

Finally, the absence of a veil of ignorance and the relative ease with which legislators and voters can identify their personal and political costs suggest that the federal legislature will have no incentive to pursue a balanced budget amendment under North's theory of the state. North argues that state actors are free to do as they please unless a viable alternative exists. Fiscal constitutionalists, in turn, claim a regime requiring a balanced budget is an alternative to the existing political structure, and Article V provides the escape route to the alternative. While a government operating under a constitutional mandate to balance the budget is certainly an alternative in theory, in practice, no one will want to move to it. In short, the opportunity costs of the current approach to fiscal policymaking may be low when compared to a process with constitutional constraints.

IV. CREATING A WINDOW FOR OPPORTUNISM

A. *The Political and Cultural Meaning of a Balanced Budget Amendment*

If constitutional decisionmakers are not behind a veil of ignorance, the fiscal constitutionalists' argument for a balanced budget amendment dissolves. Without a veil, legislators will decide the issue in a manner that advances their own self-interest rather than the interest of society at large—a situation that mirrors ordinary statutory lawmaking. Moreover, without a veil, most legislators and voters will reject a proposal to precommit to balanced budgets given the proposal's costs. The question that arises, then, is why do state and federal legislators, special interest groups, and voters consistently and widely support the budget amendment?²⁰² If the amendment is not in anyone's interest and no veil exists to enable impartial decisionmaking, fiscal constitutionalism suggests that the proposal should not have achieved the level of support it currently enjoys. This paradox highlights problems with fiscal constitutionalism, its underlying assump-

201. Elliott suggests that the constitutional convention is less likely to be corrupted by the political problems associated with cycling, vote-trading, and the attachment of unrelated riders so prevalent in the statutory context. Unlike members of an ongoing body, he argues, convention delegates will address just one issue and will have no opportunity to cycle, and they will have nothing to trade to gain the votes necessary to obtain the provisions that will benefit narrow self-interested groups. See Elliott, *supra* note 14, at 1108. Here again, however, Elliott has an idealistic view of the constitutional process. There are any number of amendment possibilities that could, in theory, generate cycling majorities. Indeed, over the course of the last 20 years, congressional members have proposed various amendments that have evidenced a diverse range of possible balanced budget amendments.

202. See *supra* notes 111-201 and accompanying text.

tions about the collective decision-making process, and the role of economic incentives. This section seeks to explain the popularity of the balanced budget amendment by exploring the ideological roots of the amendment along with its social and cultural symbolism. It argues that these factors have played a key role in the increasing popularity of the budget amendment, even while it appears to disadvantage legislators and voters. This is not to suggest that economic motivation plays no role in individual and collective decisionmaking, but rather, to offer a more nuanced, and realistic, explanation for behavior in the fiscal context.

1. *Political Ideology*

Critics of fiscal constitutionalism (and public choice theory in general) have long argued that economic self-interest cannot explain every aspect of political decisionmaking. Indeed, some argue that ideology not only plays a role, but it plays the dominant role in the decision-making process.²⁰³ The popularity of the balanced budget amendment may be, at least in part, attributable to individual ideology and the role of modern government in everyday life.

Advocates of the proposed amendment frequently suggest that their goal does not involve constitutionalizing a particular ideological viewpoint, but rather, simply the hope of injecting a minimum level of discipline into the federal budgetary process.²⁰⁴ Yet, as the historian David Kyvig notes, a close "review of the history of the balanced budget amendment makes evident that support for the measure grew not from desires to refine modern government but rather from fundamental hostility to it."²⁰⁵ The accuracy of Kyvig's point is evidenced in the contemporary debates over the size of the government and the role that the budget mandate plays in the controversy. Many, if not most, of the balanced budget advocates have expressed deep discontent with the growth in the size of the national government since the New Deal era and with the Keynesian economics that has lent intellectual support for augmented government intervention into domestic affairs. In the hope of constraining the federal government, these antigovernment theorists have zealously pursued a balanced budget amendment as a means for taming leviathan.

203. See FARBER & FRICKEY, *supra* note 143, at 24-33 (discussing various studies that focus on the role of ideology in politics).

204. See Buchanan, *supra* note 23, at 350-51 (arguing the balanced budget amendment is intended to be a procedural rather than a substantive constitutional change). *But see* Seto, *supra* note 124, at 1475-77 (noting that the balanced budget amendment is "theoretically distinct" from conservative politics but is not distinct in practice).

205. Kyvig, *supra* note 11, at 97; *see also* Seto, *supra* note 124, at 1454 n.12 (citing 17 individuals who testified before Congress and taking the position that the balanced budget amendment is key for reducing the size and power of the federal government).

In the 1970s, when the proposed balanced budget amendment gained widespread popular attention,²⁰⁶ a number of libertarian-minded individuals and groups converged on the budget issue in an effort to curtail the growth of the federal government after its virtual explosion in the previous decades. The National Taxpayers Union, for example, is often credited with bringing the proposed amendment to the nation's attention through its attack on government spending programs.²⁰⁷ Not only did the group criticize the liberal social programs adopted in the 1960s, but it also attacked other federal programs, including those that offered subsidies for postal services and municipal waste collection, as an infringement upon individual liberty and freedom.²⁰⁸ Under the assumption that Congress was not willing to levy taxes on citizens at the level necessary to pay for the various spending programs, the Union advocated a balanced budget amendment as the means for shrinking the size of the government.²⁰⁹ Simultaneously, a number of other libertarian groups, philosophically opposed to the government, formed for the purpose of supporting the balanced budget amendment. One group, the National Tax Limitation Committee, enlisted over 300,000 members within just a few years of its establishment including intellectuals such as Milton Friedman, William Niskanen, and Robert Bork.²¹⁰

The scholarly commitment to the proposed amendment, of course, was not signaled only through paid membership in libertarian groups. As discussed throughout this paper, James Buchanan and countless other fiscal constitutionalists regularly published antigovernment tracts that advocated a balanced budget amendment as a means for constricting the size of the federal government.²¹¹ Romanticizing "the wisdom of 18th century politics" and the political and economic advantages of a "minimal state," Buchanan and others have endlessly argued that Americans must revive their skepticism of big government.²¹² According to Buchanan, this skepticism could lead the nation to pursue creative means for dismantling modern government,

206. Political theorists over the course of the last two centuries have contemplated the merits of a constitutional limitation on federal borrowing. Thomas Jefferson was the first to propose a balanced budget amendment in response to Alexander Hamilton's willingness to incur debt as a means to build a strong economy. See KYVIG, *supra* note 9, at 428. Later, however, Jefferson abandoned his idea in order to purchase the Louisiana Territory in 1803. See *id.*

207. See *id.* at 429-30.

208. See *id.*

209. See *id.*

210. See *id.* at 430.

211. For example, Buchanan and Wagner wrote *Democracy in Deficit* for a popular audience. See SHAVIRO, *supra* note 39, at 93 (noting that the book, *Democracy in Deficit*, is a "brilliant polemic, filled with shrewd observations and focused on a serious problem—the growth of government resulting from fiscal illusion—to which Buchanan and Wagner propose a solution, the balanced budget amendment, that has ever since attracted serious and widespread attention").

212. See BUCHANAN, *supra* note 71, at 27.

means that include a constitutional limitation on the fiscal decision-making process.²¹³

Finally, federal and state legislators with a libertarian bent, such as Representative Jack Kemp and Governor Ronald Reagan, independently took up the balanced budget amendment as their own political cause in the 1970s.²¹⁴ Both Kemp and Reagan energetically argued that the federal government's intrusion into citizen-taxpayers' private lives offended individual liberty interests and threatened to harm the growth and stability of the national economy.²¹⁵ These Republicans (as well as countless others) embraced the balanced budget amendment in the deliberate effort to stifle government. Although the tax and spending policies that both Reagan and Kemp advanced during their tenures in office suggest that their concerns with regard to deficit spending were driven more by political aspirations than ideology,²¹⁶ their support for the proposed budget amendment nevertheless suggests the amendment served as an important symbol in the libertarian political and philosophical movement.

Although it is clear that libertarians and conservative politicians hoped to transform contemporary political institutions through the imposition of budgetary constraints, not all individuals and legislators who have supported the balanced budget amendment have been eager to dismantle the federal government along with its extensive spending programs and policies. Popular voters, for example, have overwhelmingly supported the balanced budget amendment yet, at the same time, have sought to increase the level of government spending in a number of areas.²¹⁷ Libertarian and conservative ideology, therefore, cannot entirely account for the level of support the amendment has achieved. The next section explores the social and cultural meaning of the proposed amendment to popular voters.

2. *Social and Cultural Meaning*

Popular support for the balanced budget amendment, of course, may have more to do with the publicity given the issue than with any

213. See *id.* Buchanan, in particular, has advocated the budget amendment so strenuously and vociferously over the course of the last two decades that many attribute the scholarly concern with issues of government size and structure to his work. Although conservatives such as James Buchanan have been the primary proponents of the balanced budget amendment, James Savage notes that Marxist and neo-Marxists have also criticized deficit spending. See SAVAGE, *supra* note 132, at 189 (explaining the left-wing critics' argument that inflation and debt policies are the logical outcome of "'late capitalism,' where the liberal state protected corporate profits and pacified worker demands while masking the contradictions of capitalism with 'a continuous expansion of demand'").

214. See Kyvig, *supra* note 11, at 104-05.

215. See *id.*

216. See *infra* notes 273-75 and accompanying text.

217. See Andrew Kohut & Larry Hugick, *Public Supports Higher Taxes for Domestic Programs: Education, Drug War Lead the List*, THE GALLUP REPORT, Oct. 1989, at 4, 4 (discussing popular support for spending programs).

other rationale for ratifying the proposed constitutional amendment.²¹⁸ Politicians and pundits of all political persuasions have endlessly discussed the importance of a balanced budget, often suggesting that it will protect the nation from unsustainable debt and financial disaster.²¹⁹ Gallup polls suggest that the vast majority of people merely echo this rhetoric rather than forming their own views on deficit finance.²²⁰ When pollsters asked voters to explain why they supported a balanced budget mandate, for example, most people were unable to justify their position, simply stating that "the deficit is important or unacceptable."²²¹

Yet, because the majority of people believe that Congress should enshrine the balanced budget mandate in the Constitution rather than address the fiscal question as a matter of ordinary statutory law, support for the proposed amendment must carry symbolic meaning beyond mere political rhetoric.²²² As a number of constitutional theorists have noted, consensus on amendments generally reflects the development of a fundamental change in the public's viewpoint.²²³ To advocate constitutional change is "to assert that government ought to

218. As noted above, legislators do not just reflect the will of some of the people but also create public wants, beliefs, and demands. See KENNETH M. DOLBEARE & MURRAY J. EDELMAN, *AMERICAN POLITICS: POLICIES, POWER, AND CHANGE* 321-49 (1971).

219. Senator Carl Curtis, for example, argued the balanced budget amendment was necessary to prevent "the rapidly deteriorating fiscal integrity of our nation." *Constitutional Amendments to Balance the Budget: Hearings on S.J. Res. 1 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 94th Cong. 3-13 (1977). Senator Warren Rudmann has insisted that the "country is at war. Not a traditional war, but an economic war." SHAVIRO, *supra* note 39, at 25. And Senator Paul Tsongas made a "call to economic arms" with regard to the "crushing and unsustainable debt." *Id.* Forecasts of societal disaster arising from the government's mismanagement of public resources are not new. See, e.g., RICHARD M. COUGHLIN, *IDEOLOGY, PUBLIC OPINION & WELFARE POLICY* 127-29 (1980) (discussing the views of Malthus, Herbert Spencer, Ronald Reagan, Milton Friedman, and James O'Connor on fiscal finance).

Balanced budgets have long carried weight as political symbols. Alexander Hamilton argued that the nation's debt and repayment schedule reflected a strong economy and a strong national government. Thomas Jefferson, on the other hand, argued that unbalanced budgets were an indication of corruption and tyranny. See SHAVIRO, *supra* note 39, at 17-19; WOOD, *supra* note 95, at 32-36, 107-14; SAVAGE, *supra* note 132, at 10-100 (discussing the symbolic uses of the budgets throughout American history); KYVIG, *supra* note 9, at 102 (discussing the symbolic uses of the balanced budget throughout the late 20th century).

220. On the importance of studying popular opinion, see generally V.O. KEY, JR., *PUBLIC OPINION AND AMERICAN DEMOCRACY* (1961); see also COUGHLIN, *supra* note 219, at 76-77 (discussing the merits and pitfalls of using popular opinion polls in scholarly research).

221. George Gallup, Jr. & Dr. Frank Newport, *Americans Rate Federal Deficit As Important, But Are Unsure Why*, *THE GALLUP POLL MONTHLY*, May 1990, at 24, 24.

222. It seems unlikely that the general public understands the public choice claim that statutes are subject to political maneuvering in a way that constitutions are not. However, the general populace is likely to understand that constitutional laws often reflect fundamental values and popular sovereignty in the way that statutory law does not. See RAKOVE, *supra* note 152, at 340 (stating the Constitution represents the highest exercise of popular sovereignty).

223. See BERSTEIN & AGEL, *supra* note 67, at 169. See generally MARY FRANCES BERRY, *WHY ERA FAILED: POLITICS, WOMEN'S RIGHTS, AND THE AMENDING PROCESS OF THE CONSTITUTION* (1986) (arguing a political culture attached to the status quo is not inclined to favor amendment without some fundamental change in viewpoint); MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* (1987) (same).

function according to some fundamental value not currently being observed.”²²⁴

Popular support for a balanced budget amendment may be related to the perceived similarities between government debt and individual household debt.²²⁵ Historically, governmental and individual borrowers have had much in common. Governments, like individuals, have failed to meet their loan obligations and have often become dependent on creditors to meet their fiscal needs.²²⁶ As Daniel Shaviro notes, however, this analogy is not perfect. First, the federal government faces a significantly lower risk of default on debt than individual households, given its powers to raise taxes and to print money.²²⁷ Moreover, unlike household debt, national debt is internal in the sense that the debtors and creditors are two groups that can and do overlap. American taxpayers’ failure to repay the loan obligations, therefore, will largely amount to the failure to repay the money they owe to themselves.²²⁸

Nevertheless, the popular misconception that a federal government default is identical to a private individual’s bankruptcy may explain the widespread concern with budgetary issues. Individuals who default on their loans often feel a sense of guilt and shame and may be perceived as personal and professional failures.²²⁹ Moreover, the administrative hassles associated with one’s failure to repay debt can be a major life disruption. Bankruptcy proceedings are not only extremely time consuming, but they can interfere with further borrowing because of the perception of increased credit risk.²³⁰ Even if the borrower avoids defaulting on her loan, the very prospect of losing one’s

224. KYVIG, *supra* note 9, at 427.

225. A number of theorists note this possible connection. See, e.g., SHAVIRO, *supra* note 39, at 13-16 (briefly exploring analogy between private and public debt). At the same time, a number of theorists make this analogy for purposes of defending the balanced budget amendment. See, e.g., Charles K. Rowley, *Classical Political Economy and the Debt Issue*, in DEFICITS, *supra* note 35, at 49, 69. But see 141 CONG. REC. H728 (daily ed. Jan. 26, 1995) (statement of Rep. Thorton) (arguing that most families are willing to take on a responsible level of private debt).

226. See generally Steven Cohen, *Give Me Equity or Give Me Debt: Avoiding a Latin American Debt Revolution*, 10 U. PA. J. INT’L BUS. L. 89 (1988) (exploring the world debt crisis and the relationship between the creditor and debtor countries); see also Ernest Beck, *Loan from IMF, World Bank Credits Help Bulgaria Avert Bankruptcy Now*, WALL ST. J., Aug. 19, 1996, at A2 (discussing the “IMF-mandated fiscal stabilization package” which sparked public dissent but to which Bulgaria agreed in order to obtain new loans); Shafiq Islam, *Chapter 11 Workouts for Latin Debtors*, WALL ST. J., Feb. 3, 1989, at A12 (discussing debt crisis in Mexico, Brazil, and Argentina).

227. See SHAVIRO, *supra* note 39, at 2.

228. See *id.*

229. See *id.* at 14. To some borrowers, the prospect of default may encourage borrowing, given that default offers the possibility to use funds and never repay them. See *id.*

230. See *id.*

assets can be painful due to the endowment effect²³¹ as well as the declining marginal utility of one's wealth.²³²

Indeed, as Shaviro notes, "[F]ew themes in literature are as popular and perennial as the plight of the borrower burdened by crushing debts."²³³ In his book, *Do Deficits Matter?*, Shaviro identifies a number of fictional characters, including Antonio in William Shakespeare's *Merchant of Venice*; Emma in Gustave Flaubert's *Madame Bovary*; and Wilkins Micawber in Charles Dickens's *David Copperfield*, all of which reflect the cultural perceptions of borrowing and bankruptcy.²³⁴ With regard to Dickens's work, for example, Shaviro notes, "The novel's mix of fondness for Micawber [a character plagued with debt] and ironic distance from him only sharpen the reader's sense of the desperate practical importance of the qualities of foresight, self-discipline, and the sense of purpose he so sadly lacks."²³⁵ Micawber and the other fictional characters are debtors, and consequently, are viewed as imprudent, impractical, and undisciplined.

As Shaviro suggests, if household borrowing and bankruptcy are perceived as morally questionable activities, and government debt is perceived to be analogous to household debt, both are irresponsible and undisciplined. That Americans overwhelmingly endorse a balanced budget mandate, yet are often completely unaware of whether the government is actually running a deficit, strongly indicates that the mere idea of a deficit and default is offensive at both the household and government levels.²³⁶

Yet the questionable moral status of borrowers that Shaviro highlights in the literature and in popular culture seems to be more a phenomenon of the past than of the present. Indeed, Shakespeare,

231. For a discussion of the endowment effect, see George A. Quattrone & Amos Tversky, *Contrasting Rational and Psychological Analysis of Political Choice*, 82 AM. POL. SCI. REV. 719, 720 (1998). See also McCaffery, *supra* note 119, at 1880-81.

232. See SHAVIRO, *supra* note 39, at 14.

233. *Id.*

234. See *id.*; see also BARBARA WEISS, *THE HELL OF THE ENGLISH: BANKRUPTCY AND THE VICTORIAN NOVEL* 13-22 (1986) (exploring social and cultural views of bankruptcy in English literature); John D. Ayer, *How to Think About Bankruptcy Ethics*, 60 AM. BANK. L.J. 355, 365-67 (1997) (discussing the horror of bankruptcy in French literature); Lisa J. McIntyre, *A Sociological Perspective on Bankruptcy*, 65 IND. L.J. 123, 132 (1989) (tracing the early American view on borrowing and bankruptcy). See also generally P. COLEMAN, *DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1677-1900* (1974) (providing historical account of American views on debtor/creditor relationship).

235. SHAVIRO, *supra* note 39, at 14. Interestingly, Charles Dickens's own father was imprisoned for his failure to repay debt. See *THE OXFORD COMPANION TO ENGLISH LITERATURE* 272-73 (Margaret Drabble ed., 1985) [hereinafter OXFORD COMPANION] (providing a brief historical account of Dickens's life).

236. See *Public Feels Cuts in Deficit Spending Best Way to Reduce '84 Federal Deficit; Many Unaware Government Operating in Red*, THE GALLUP REPORT, Feb. 1983, at 16, 16 (indicating one-third of respondents were completely unaware that the government was operating at a loss and of those who were aware, only one-fourth could accurately approximate the size of the federal deficit).

Flaubert, and Dickens all wrote well before the era of deficit financing and easy credit.²³⁷ Current popular opinion suggests that few individuals view borrowers and those unable to repay their loan obligations as immoral.²³⁸ This widespread acceptance is demonstrated by the fact that borrowers and debtors in bankruptcy are “not some distant and different ‘other’ from whom we can distance ourselves but part of mainstream America.”²³⁹ The average American household, for example, owes \$35,000 for credit card purchases, car loans, and mortgages.²⁴⁰ Not only do Americans routinely borrow, but more than one million individuals file for bankruptcy each year.²⁴¹

Moreover, the creditor-debtor relationship has dramatically changed over the course of the last century. It has become impersonal, with loans being made based on computer printouts and objective factors such as income and payment records.²⁴² Creditors no longer make decisions based on the personal relationships and individual characteristics that seemed so important to neighborhood bankers in years past.²⁴³ Accordingly, as a number of bankruptcy theorists have noted, the decision to loan money or to file for bankruptcy

237. William Shakespeare wrote in the late 16th century, while Gustave Flaubert and Charles Dickens wrote in the mid-19th century. See OXFORD COMPANION, *supra* note 235, at 272, 353, 889. Although many Victorians engaged in extensive borrowing due to the lack of coin, see *supra* note 97 and accompanying text, the period of extensive and systematic deficit spending did not begin until 1932. See *infra* notes 337-38 and accompanying text.

238. See Warren Cohen, *Going Broke*, U.S. NEWS & WORLD REP., Jan. 21, 1991, at 8 (indicating 78% of Americans believe that bankruptcy is more acceptable today than it was in the past).

239. TERESA A. SULLIVAN ET AL., AS WE FORGIVE OUR DEBTORS 16, 346 (1989); see also Robert A. Kagen, *The Routinization of Debt Collection: An Essay on Social Change and Conflict in the Courts*, 18 LAW & SOC'Y REV. 323, 363 (1984) (noting debtors are no longer filled with guilt or plagued by embarrassment upon default); McIntyre, *supra* note 234, at 138 (questioning how stigmatizing bankruptcy really can be if so many famous and respectable companies and individuals as well as friends and family members have filed for bankruptcy).

240. See Howard Rudnitsky, *An Excess of Plastic*, FORBES, Feb. 4, 1991, at 52, 52 (citing average debt levels and noting that overall, Americans owe \$3.2 trillion for consumer purchases); see also Joshua Wolf Shenk, *In Debt All the Way up to Their Nose Rings*, U.S. NEWS & WORLD REP., June 9, 1997, at 38, 38 (noting that 65% of college kids have credit cards and the average debt for households headed by an individual under 25 is \$1,721). Loans are obtained from an extremely diverse group of creditors including credit card issuers, like Visa, American Express, and Mastercard; banks; savings and loans; mortgage companies; gasoline companies; department stores; GMAC; and Chrysler credit.

241. See Kim Clark, *Why So Many Americans Are Going Bankrupt*, FORTUNE, Aug. 4, 1997, at 24, 24-25; see also SULLIVAN ET AL., *supra* note 239, at 331 (noting that while the population has increased, the number of bankruptcy filings has increased by an even greater percentage).

242. See SULLIVAN ET AL., *supra* note 239, at 282-327.

243. Sullivan, Warren, and Westbrook note these changes:

In today's credit market, most creditors are likely to be large, impersonal corporations, rather than Grant Herring down at Herring Hardware. Debtors may feel less compunction about stiffing ITT Financial than they would Mr. Herring, especially if ITT virtually thrust the credit on them ("We have \$2,000 waiting for your signature"), while Mr. Herring sold on credit to help out when times were tough.

Id. at 337.

are choices driven by economic considerations rather than moral or ethical dilemmas.²⁴⁴

The bankruptcy law itself works to alleviate the stigma associated with a loan default. By discharging debt through the bankruptcy process, the laws “preserve the dignity of a debtor, insulate his family from his misfortunes, and provide an impetus to industry by freeing human capital.”²⁴⁵ Although the discharge, which is the principal purpose of the bankruptcy laws, may not reflect the notion that it is “right” to avoid creditors and debt, it is consistent with a tolerant attitude toward not paying one’s debts.²⁴⁶ Shaviro’s claim that borrowing and bankruptcy imply immorality, therefore, appears to be more of a past than a present phenomenon.

Fiscal constitutionalists who advocate the balanced budget amendment acknowledge a shift in popular fiscal viewpoints and lament the passing of Victorian social norms identified by Shaviro in the English literature. James Buchanan, for example, notes:

To the Victorian, the consumption of capital was venality itself, and even full consumption of income was prodigal in the extreme. Ordinary prudence demanded that some share of income be put aside for adding to the capital stock. In their world, capital, once created, was indeed permanent, whether it was measured separately in each family’s portfolio or jointly in the national aggregates. . . .

. . . .

How distant these Victorians seem to us now!²⁴⁷

Charles K. Rowley, another prominent fiscal constitutionalist who advocates the ratification of a balanced budget amendment, also notes the link between Victorian values and the morality of balanced budgets. “Virtue and prudence as embedded in Victorian household morality,” Rowley argues, “exerted an influence difficult to define for a contemporary hedonistic culture. . . . As with households, so it was with nations—there was no Keynesian fallacy of composition behind which profligates could shield themselves in Victorian culture.”²⁴⁸

244. See *id.* at 207-17 (explaining one reason debtors file for bankruptcy is to escape the burden of interest charges); Michelle J. White, *Personal Bankruptcy Under the 1978 Bankruptcy Code: An Economic Analysis*, 63 IND. L.J. 1, 14-18 (1987) (noting that the economic advantages of bankruptcy encourage its use).

245. Richard Flint, *Bankruptcy Policy: Toward a Moral Justification for Financial Rehabilitation of the Consumer Debtor*, 48 WASH. & LEE L. REV. 515, 572 (1991); see also SULLIVAN ET AL., *supra* note 239, at 20 (noting that the heart of the bankruptcy law is to discharge debt, thereby giving individuals a “fresh start”).

246. See John Ayer, *supra* note 234, at 366-67 (1986) (noting that one way to make clear a disapproval of people who do not pay their debts is to refuse to release them from liability).

247. JAMES M. BUCHANAN, *LIBERTY, MARKET AND STATE: POLITICAL ECONOMY IN THE 1980s*, at 195 (1986).

248. Rowley, *supra* note 225, at 69; see also ELIZABETH DREW, *PORTRAIT OF AN ELECTION: THE 1980 PRESIDENTIAL CAMPAIGN* 113 (1981) (quoting Ronald Reagan as saying, “Balancing

The comments of Buchanan and Rowley indicate that, while Victorian culture taught that borrowing was shameful and immoral, twentieth-century culture does not share this view. Borrowing has become not only morally acceptable but financially prudent for both individual households and for national governments. Countless public finance theorists view deficit finance as an important means for remedying national economic problems.²⁴⁹ Indeed, it is the *failure* to borrow that is now perceived to be a reflection of imprudence and impracticality rather than the acquisition of credit.²⁵⁰ A constitutional precommitment to balanced budgets, therefore, would be a return to Victorian values not a codification of contemporary values.²⁵¹

Although Shaviro's claim that all individuals who borrow and then default suffer public condemnation is overstated, it does appear that public acceptance is contingent upon the existence of certain conditions. Sociological data suggests that the public distinguishes between "good" and "bad" debtors.²⁵² To understand how these concepts relate to federal deficit spending, it is important first to understand the underlying assumptions attached to "good" and "bad" debtors.

Individuals who are perceived as "good" or responsible debtors obtain mortgages, car loans, and credit card advances and generally are able to repay them within a reasonable amount of time after the

the budget is like protecting your virtue: all you have to do is learn to say no."); Buchanan, *supra* note 49, at 191 ("We have reaped and are reaping the fiscal whirlwind that resulted from the Keynesian destruction of the Victorian norms for fiscal-budgetary prudence.").

249. See SHAVIRO, *supra* note 39, at 241 (arguing rigorous balanced budget amendment would worsen the business cycle by eliminating the automatic countercyclical effect of fiscal policy, as a recession works to decrease tax revenue, while increasing various welfare and social insurance payouts); Seto, *supra* note 124, at 1473 (citing congressional testimony of 14 prominent economists who continue to assert that budget deficits can ameliorate recessions).

250. See S. REP. NO. 105-3, at 56 (1997) (citing Treasury Secretary Robert Rubin as stating that a limit on public debt could "turn slowdowns into recessions, and recessions into more severe recessions or even depressions").

251. Perhaps the problem could be understood if considered within the framework of Jungian psychology. Carl Jung suggests that we all have a shadow personality—a largely unconscious and morally uncontrollable collection of primitive emotions, judgments, and impulses that function as our dark side. While we are unconscious of the shadow, it is usually projected onto some other person and thus serves as a basis for judgment and impulse. Hence, when a person loathes someone else it may well be that the loathing is really one's own unrecognized evil. See CARL JUNG, *THE PORTABLE JUNG* 144-48 (Joseph Campbell ed. & R.F.C. Hull trans., 1971). The national obsession with balanced budgets, therefore, might demonstrate an individual's view that household borrowing is immoral and loathsome, and default is even worse. Thus, the focus on the balanced budget amendment may actually be an indication of our own self-loathing. Cf. Calvin R. Massey, *Pure Symbols and the First Amendment*, 17 HASTINGS CONST. L.Q. 369, 375 (1990) (arguing that tolerance of undesirable and unwanted behavior may illuminate troublesome views and ultimately, enable societal growth and transformation); Calvin R. Massey, *Rule of Law and the Age of Aquarius*, 41 HASTINGS L.J. 757, 766 (1990) (reviewing GEOFFREY DE Q. WALKER, *THE RULE OF LAW: FOUNDATION OF CONSTITUTIONAL DEMOCRACY* (1988)) (using Jungian psychology to understand society's acceptance of legal norms).

252. See SULLIVAN ET AL., *supra* note 239, at 8 ("People see bankruptcy through a lens of fault. . . . Most people envision one or the other stereotype of the typical bankrupt—the unemployed steelworker or the grasshopper hedonist.").

date of purchase.²⁵³ It is only with an unforeseen financial crisis that “good” debtors will file for bankruptcy.²⁵⁴ Before seeking a debt discharge, however, the “good” debtor will go to extraordinary lengths to repay the loan.²⁵⁵ Social tolerance of the “good” debtor, therefore, appears to be contingent upon the perceived reasonableness of the level of individual debt obtained, the nature of the consumer purchases (i.e., was the loan obtained to buy everyday necessities or luxuries?), and the energy employed to avoid the bankruptcy court. As Professor Elizabeth Warren and others have noted, when an unemployed steel worker, a newly widowed mother of young children, or a hardworking business entrepreneur are forced into bankruptcy after pursuing all the available means to repay their debt, they are not viewed as moral or financial failures but rather as unlucky individuals suffering from the economic downturns that affect us all to a greater or lesser extent.²⁵⁶

The perceived “bad” or irresponsible debtors, on the other hand, are individuals who engage in excessive borrowing for items such as vacations and other extravagant and unnecessary items.²⁵⁷ They run up their credit card bills to a level far beyond their ability to pay and are forced to pay off their loan obligations through further borrowing.²⁵⁸ Having lived far beyond their means, these individuals often cannot pay even the interest on their debt, let alone the loan itself, and are left with no alternative but to file for bankruptcy.²⁵⁹ In short, the public has great tolerance for individuals who encounter financial hardships beyond their control but seems to fear and loathe those who are perceived to be personally irresponsible in taking on excessive debt and then seeking protection under the bankruptcy code.²⁶⁰ Put differently, the public is moved by the plight of the laid-off steel worker, but “[f]ew people would shed a tear for the family who charged vacations, waterbeds, and dinners at Antoine’s, and then skipped off to bankruptcy court.”²⁶¹

This division between worthy and unworthy debtors may also affect the public perception of the federal government. With its \$5.3 tril-

253. See *id.* at 108-77 (exploring the biographical data of good debtors and characterizing them as the “entrepreneurs,” “homeowners,” and “medical debtors”).

254. See *id.* at 63 (describing bankrupt debtors as having serious medical and financial emergencies).

255. See SULLIVAN ET AL., *supra* note 239, at 8; McIntyre, *supra* note 234, at 135-36 (the efforts of individual debtors to honor loan contracts surpass what might be considered reasonable in most circumstances).

256. See SULLIVAN ET AL., *supra* note 239, at 8.

257. See *id.* at 178-98 (describing “credit card junkies” and “the [bankruptcy] repeaters”).

258. See *id.* at 207-17.

259. Bankruptcy experts note that some individuals file under chapters 7 and 13 of the bankruptcy code simply to halt the interest charges that continue to mount while the debt is unpaid. See *id.*

260. See *id.* at 8.

261. *Id.*

lion deficit and \$248 billion in annual interest payments,²⁶² the federal government evokes the stereotype of the irresponsible debtor—the debtor who purchases unnecessary goods and services and then pays its bills through further and more excessive borrowing. That citizen-taxpayers view government borrowing and spending as irresponsible is evident in a recent Gallup poll. In 1995, eighty-two percent of all respondents thought Congress engaged in excessive borrowing for items that were wholly unnecessary.²⁶³ Indeed, sixty-seven percent of people thought that the government should make it either a “top” priority or a “high” priority to reduce federal spending programs generally, and seventy percent thought welfare payments, in particular, should be limited.²⁶⁴ Moreover, the polls indicate that many citizens object to the government using tax revenue to make interest payments on government debt,²⁶⁵ rather than allocating public funds to socially useful programs that benefit society-at-large.²⁶⁶ Similar to the individual who makes irresponsible financial decisions, the government is perceived to be imprudent, impractical, and undisciplined with regard to federal fiscal policymaking. The federal government is, perhaps, a “bad” debtor.

While a substantial majority of individuals perceive government borrowing as excessive and consider many public goods and services unnecessary, it is important to recognize that when asked about specific federal programs, these same individuals express a desire for a higher level of government-provided goods and services. The majority of Gallup poll respondents, for example, favor more spending on public education, homelessness, health care, clean air, AIDS research, job training, and low-income assistance.²⁶⁷ While individuals want less federal spending in the abstract, the polls suggest individuals, in fact, do not believe the government is excessive and irresponsible.

This inconsistency is similar to the way in which creditors view private, individual debtors. Creditors have frequently taken the position that debtors purposefully engage in immoderate borrowing and then cheat the system by using the bankruptcy laws to obtain a discharge.²⁶⁸ Yet when asked to provide specific examples of excessive borrowing and bankruptcy fraud, the creditors are often unable to point to any particular individual.²⁶⁹ In short, it is the perception of

262. See S. REP. NO. 105-3, at 7, 9 (1997).

263. See Moore, *supra* note 8, at 3.

264. See *id.*

265. See *id.*

266. See *id.* at 2-4.

267. See Kohut & Hugick, *supra* note 217, at 4 (discussing the broad support for domestic spending in general).

268. See SULLIVAN ET AL., *supra* note 239, at 200 (describing a congressional hearing in which industry spokespeople identified the problem of abuse in the bankruptcy context).

269. In responding to Chairman Rodino's question about the identity of bankruptcy code abusers, an industry representative could only come up with “five ‘typical abusers.’” See *id.* The General Accounting Office then inquired into the circumstances of the named debtors and dis-

irresponsibility rather than the actual lack of discipline that motivates both the creditors and the citizen-taxpayers to criticize the private and public debtors. The criticism, however, also suggests that taxpayers, like creditors, hope to discourage Congress from further disadvantaging them through legal reform in general and the tax laws in particular.

*B. Legislative Opportunism: Displaying Fiscal Responsibility
Without Binding Constraints*

1. The Policy Entrepreneur

The social and political meaning of balanced budgets explains why politicians have energetically pursued the ratification of the amendment. Through their support for the balanced budget, the legislators will appear to be advocating small, fiscally responsible government.²⁷⁰ Indeed, by posturing as stern advocates of a balanced budget, the congressional members encourage the voters to view them as willing to make hard choices, able to rise above interest group politics, and ready to promote the public good at high personal costs. In short, legislators are acting as “policy entrepreneurs” in the effort to promote their own prestige and reelection chances.²⁷¹ By observing, publishing, and exaggerating budgetary concerns and, at the same time, proposing a balanced budget amendment, the legislators appear to be in control and uniquely positioned to quell the very fears they helped to create with regard to the size of government and fiscal responsibility.²⁷²

covered that one had multiple sclerosis, another had been injured in a serious car accident, and a third had lost his job and was forced to move into a mobile home with his in-laws. *See id.* at 200-01.

270. *See* S. REP. NO. 105-3, at 7-8 (discussing the importance of adopting a balanced budget mandate as a means to promote responsible, fair, and efficient fiscal policymaking).

271. Policy entrepreneurs are members of the government who introduce legislation and influence to promote legislative action or preserve the status quo. *See* Vincent Di Lorenzo, *Legislative Chaos: An Exploratory Study*, 12 YALE L. & POL’Y REV. 425, 433 (1994) (explaining that the policy entrepreneur is the initiator of the course of action or inaction); *see also* JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 122-23 (2d ed. 1995) (arguing that the defining characteristic of policy entrepreneurs is “their willingness to invest their resources—time, energy, reputation, and sometimes money—in the hope of a future return. That return might come to them in the form of policies of which they approve, satisfaction from participation, or even personal aggrandizement in the form of job security or career promotion.”). Shavero notes that policy entrepreneurship, although often viewed in negative terms, has a positive side as well. As the principal alternative to interest group politics it makes possible “legislation that pits widely disbursed benefits against narrowly concentrated costs.” SHAVIRO, *supra* note 39, at 94.

272. *See* Kyvig, *supra* note 11, at 114-22 (exploring the political use of the balanced budget proposals); *see also* MURRAY EDELMAN, *POLITICS AS SYMBOLIC ACTION* 13 (1971) (discussing the symbolic use of political issues generally). Theorists also argue that the threat of a constitutional convention has pushed Congress to consider seriously a balanced budget amendment. *See, e.g.,* Kyvig, *supra* note 11, at 108-12; *see also supra* notes 177-201 and accompanying text (discussing the constitutional convention as an alternative means for obtaining a balanced budget amendment).

Former President Reagan's presidential campaign and his subsequent economic policy programs demonstrate the manner in which politics can play into political and cultural symbolism. Arguing that the government was the problem and not the problem solver, Reagan advocated the balanced budget amendment throughout his tenure in office as a means for attaining a smaller, more responsible government structure.²⁷³ Using terminology that recalled the Victorian era and that would satisfy both those politically and morally opposed to deficit spending, Reagan argued, "Balancing the budget is like protecting your virtue: all you have to do is learn to say no."²⁷⁴ Yet, President Reagan chose not to propose either a balanced budget or a series of budgets that had any realistic chance of ever achieving a balance. Instead, Reagan created the largest peacetime deficit in American history, doubling the nation's debt in just five years.²⁷⁵

A key aspect of this legislative opportunism is that the legislators who did propose balanced budget amendments never included provisions that would actually constrain the legislative process or precommit the legislature to balance the budget.²⁷⁶ In order to understand fully the importance (and difficulty) of achieving an effective balanced budget amendment, we must first understand what it means for a polity to precommit itself. In his classic work, *Ulysses and the Sirens*, Jon Elster identified five criteria for precommitment.²⁷⁷ For our purposes, only the third criterion is relevant: a precommitment or binding constraint exists only if there is "some causal process in the external world" that operates as an enforcement mechanism.²⁷⁸ According to Elster, the legislature cannot simply precommit to "decide in the future" to balance the budget. Rather, an outside process must be es-

273. See Savage, *supra* note 132, at 209.

274. DREW, *supra* note 248, at 113; see also Kyvig, *supra* note 11, at 111.

275. See ARNOLD, *supra* note 47, at 182; see also Noll, *supra* note 125, at 207 ("There is something incongruous about a President who speaks of the need to have a constitutional amendment to restrain him from responding to political incentives that other presidents have been substantially more successful in resisting. Perhaps he simply wants to assure the permanence of his entry in the Guinness Book of World Records.").

276. See Seto, *supra* note 124, at 1467 n.58 (stating public choice theory suggests Congress will draft and approve a balanced budget amendment that will purposefully be ineffective).

277. Elster's five requirements are:

- (i) To bind oneself is to carry out a certain decision at time t_1 in order to increase the probability that one will carry out another decision at time t_2
- (ii) If the act at the earlier time has the effect of inducing a change in the set of options that will be available at the later time, then this does not count as binding oneself if the new feasible set includes the old one. . . .
- (iii) The effect of carrying out the decision at t_2 must be to set up some causal process in the external world. . . .
- (iv) The resistance against carrying out the decision at t_1 must be smaller than the resistance that would have opposed the carrying out of the decision at t_2 had the decision in t_1 not intervened. . . .
- (v) The act of binding oneself must be an act of commission, not omission.

ELSTER, *supra* note 54, at 39-47.

278. See *id.*; see also Boudreaux & Pritchard, *supra* note 67, at 124-26 (arguing that constitutions satisfy Elster's five criteria for precommitment).

established that takes the decision away from Congress. If there is no independent body responsible for ensuring that Congress adheres to its precommitment, the precommitment is no more than a ritual or political symbol.²⁷⁹ While rituals and symbols have political value to legislators concerned with reelection, they do not necessarily work to tie the hands of the legislature.²⁸⁰

Some might argue that absent a specific enforcement measure, such as an outside causal mechanism, the electorate might, nevertheless, compel adherence to a constitutional mandate given the importance of political symbols to voting behavior. That is, politicians cannot simply ignore the value of political symbols to their constituency unless they are prepared to sacrifice their votes along with their reelection chances. Yet, as a number of budget scholars have noted, politicians can easily engage in smoke and mirrors manipulations that give the false impression that the budget mandate has been satisfied when, in fact, it has been violated. The problem for fiscal constitutionalists is that without an independent body to ensure enforcement of the balanced budget mandate, the public could easily be fooled.²⁸¹

James Buchanan recognizes the difficulties associated with enforcement and correctly points out that if legislative and constitutional rules required perfect enforcement, Congress would effectively be barred from adopting any laws.²⁸² However, Buchanan also argues that the scholarly concern with smoke and mirrors manipulations is misplaced. According to Buchanan, Congress and the President rarely, if ever, breach constitutional rules. In his words, "The very fact that such a rule would be constitutional, and understood as such, would seem to be sufficient to guarantee basic adherence."²⁸³

That Buchanan suggests legislators will voluntarily comply with a balanced budget mandate merely because it is enshrined in the U.S.

279. See ELSTER, *supra* note 54, at 43.

280. See *infra* notes 325-55 and accompanying text for discussion of how norms might tie the hands of legislators.

281. See SHAVIRO, *supra* note 39, at 4, 7, 100, 105, 253-54 (discussing smoke and mirrors policies that enable legislators to appear to balance the budget when in fact they have merely used complex accounting measures to hide the fiscal realities); Buchanan, *supra* note 23, at 353 (noting that politicians will seek to use avoidance and evasion techniques to balance the budget but arguing that no law would ever be adopted if perfect enforcement were required); Seto, *supra* note 124, at 1506-34 (exploring the various mechanisms that federal legislators can use to avoid balancing the budget); see also Kenneth J. Kirkland, "Creative Accounting" and Short-Term Debt: State Responses to the Deficit Threat, 36 NAT'L TAX J. 395 (1983) (exploring techniques that state legislators have used to avoid balanced budget and debt limitations); Daniel B. Suits & Ronald C. Fisher, A Balanced Budget Constitutional Amendment: Economic Complexities and Uncertainties, 38 NAT'L TAX J. 467, 474-75 (1985) (exploring the budgeting process in Michigan and noting the ease with which legislators circumvent the balanced budget requirement).

282. See Buchanan, *supra* note 23, at 353 (arguing no law that demands perfect enforcement could pass).

283. *Id.* at 354. For a historical discussion of the importance of respecting and adhering to the constitution as part of the "civil religion," see generally SANFORD LEVINSON, CONSTITUTIONAL FAITH 9-53 (1988).

Constitution is surprising, indeed. He and other fiscal constitutionalists endlessly criticize traditional public finance theorists for making a similar assumption with regard to politicians' willingness to act against their own self-interest merely because they hold an elected office. They routinely reject the idea that individuals do not exhibit the characteristics of "Dr. Jekyll and Mr. Hyde," acting for the greater public good as legislators and in a self-interested manner as citizen-taxpayers.²⁸⁴ Yet, Buchanan suggests here that legislators will rise above their own self-interest even in the absence of a veil of ignorance in the constitutional context. In short, Buchanan argues that legislators are willing to manipulate statutory law but not constitutional rules in everyday politics.²⁸⁵

Buchanan's position is problematic for several reasons. First, every proposed balanced budget amendment considered thus far has contained an escape hatch that allows a supermajority of Congress to override the balanced budget mandate.²⁸⁶ While this added criterion may be more difficult to overcome than the usual majoritarian requirement, it clearly enables Congress to suspend the operation of the amendment at any given time.²⁸⁷ Second, backdoor spending may not pose constitutional problems under a balanced budget mandate.²⁸⁸ Congress, for example, may decide to move certain expenditures off the budget, thereby enabling the legislators to circumvent the balanced budget mandate without necessarily violating constitutional norms.²⁸⁹ Alternatively, Congress might manipulate revenue estimates, which would enable the representatives to spend at a higher

284. See McCORMICK & TOLLISON, *supra* note 72, at 5 (arguing legislators are not Dr. Jekyll and Mr. Hyde).

285. See Buchanan, *supra* note 23, at 354.

286. See *infra* note 322.

287. Congress's ability to override the balanced budget amendment not only suggests the mandate will be ineffective but also draws into question its public-regarding nature. After all, Congress cannot simply vote to suspend the First Amendment or an individual's right to be free of cruel and unusual punishment.

288. Congress may decide that particular government activities, like the postal delivery system, should be self-sustaining and responsive to free market demand. This decision to move an item off-budget is within Congress's authority, yet if done too often will undermine the very mandate of balanced budgets. See Charles Schultze, *Politics and Economics of a Balanced Budget Amendment*, in THE CONSTITUTION AND THE BUDGET 120 (W.S. Moore & Rudolph G. Penner eds., 1980) (providing a brief discussion of off-budget items and noting how they will be used to circumvent technical budgetary requirements); see also Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1381-83 (1988) (arguing that substantive backdoor spending does not violate the constitutional norm requiring Congress to control the public fisc).

289. See Noll, *supra* note 125, at 208 (explaining a constitutional amendment to balance the budget would face difficulties associated with off-budget activities, such as the use of tax incentives and loan guarantees to channel private expenditures into areas the government would abandon if the budget had to be smaller); Seto, *supra* note 124, at 1494-96 (discussing the use of "off-budget" items in the context of balanced budget mandates). See generally Kenneth Ryder, *A Guide to FIRREA's Off-Budget Financing*, 2 STAN. L. & POL'Y REV. 82 (1990) (describing and discussing the off-budget financing of the S&L crisis).

level than the revenue obtained.²⁹⁰ Former Senator Obey highlighted these problems when he noted that “for every clever device that we establish in print, we can find a cleverer legislator or a clever somebody else to get around it.”²⁹¹ Evidence of these smoke and mirrors devices exists in the context of the states. At least twenty-five states have balanced budget amendments in their constitutions,²⁹² yet state legislatures have developed a number of escape devices to enable routine circumvention of constitutional mandates.²⁹³ Finally, and most problematic, Buchanan leaves the legislators responsible for enforcing the amendment, which fails to satisfy Elster’s requirement of an “outside causal process” for ensuring compliance with the precommitment.²⁹⁴

2. *The Role of the Courts*

Enforcement problems will also arise because federal courts, “the traditional guarantors of the constitutional order,” are unlikely to play a significant role in ensuring adherence to the balanced budget mandate.²⁹⁵ First, the Supreme Court has refused to oversee taxing and spending legislation since the turn of the century.²⁹⁶ Second, even if the court were inclined to play an institutional role ensuring Congress

290. See Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 U. KAN. L. REV. 1113, 1156-58 (1997).

291. David R. Obey, *The Balanced Budget: A View from the Congress*, in THE CONSTITUTION AND THE BUDGET, *supra* note 288, at 129, 129 (“Does anybody here really think that Charles Schultze or Charls Walker or Russell Long could not invent whatever bookkeeping system is needed to get around an amendment? For every clever device that we establish in print, we can find a clever legislator or clever somebody else to get around it.”).

292. The financial panic of 1837 caused a number of states to default, which, in turn, led them to adopt constitutional amendments mandating balanced budgets or limiting borrowing powers. See ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, NO. A-107, FISCAL DISCIPLINE IN THE FEDERAL SYSTEM: NATIONAL REFORM AND THE EXPERIENCE OF THE STATES 40-41 tbl.3 (1987) (discussing state limitations on the budgetary process); SAVAGE, *supra* note 132, at 117 (providing a table indicating the years in which the states adopted constitutional debt limitations); SHAVIRO, *supra* note 39, at 19 (providing a brief overview of the financial crisis that led the states to adopt balanced budget amendments and various other debt limitations). See generally A. JAMES HEINS, CONSTITUTIONAL RESTRICTIONS AGAINST STATE DEBT (1963) (same).

293. See SAVAGE, *supra* note 132, at 237-39 (discussing revenue bonds, public corporations, delegations, and lease-purchase agreements as methods the states use to evade balanced budget mandates); Lubecky, *supra* note 11, at 573-74 (discussing the complicated budgetary devices states use to technically balance budgets); Stewart E. Sterk & Elizabeth S. Goldman, *Controlling Legislative Shortsightedness: The Effectiveness of Constitutional Debt Limitations*, 1991 WIS. L. REV. 1301, 1330-57 (providing detailed explanations of the accounting measures state legislatures use to avoid balanced budget mandates); Suits & Fisher, *supra* note 281, at 474 (exploring the avoidance techniques in Michigan’s budgeting process). See generally Kirkland, *supra* note 281 (exploring techniques that state legislators have used to avoid balanced budget and debt limitations).

294. See *supra* notes 277-80 and accompanying text.

295. Seto, *supra* note 124, at 1470, 1512-13 (noting the court is the traditional guarantor of the Constitution but arguing it is not necessary that it play this role in the balanced budget amendment context).

296. See *id.*

satisfies a constitutional obligation to balance the budget, the task would be extremely difficult given the financial complexities involved. As an illustration of these complexities, consider the problems that can arise with regard to the accounting method used to balance the budget. Under the "cash method" of accounting, income is recorded when received and expenses are recorded when paid.²⁹⁷ Under the "accrual method," financial transactions are reported based on the substance of the entity's activities and commitments. Income is reported when earned (rather than when received) and expenses are reported when incurred (rather than made).²⁹⁸ Both methods raise serious enforcement problems.

Governments overwhelmingly use the cash method of accounting, yet it is a technique that is susceptible to easy manipulation.²⁹⁹ Consider a hypothetical designed by Professor Theodore Seto to illustrate how the cash method of accounting allows circumvention of a balanced budget mandate and promotes fiscal irresponsibility. Assume the federal deficit stands at \$5 trillion and Congress has a balanced budget mandate.³⁰⁰ In order to eliminate the deficit, Congress authorizes the issuance of twenty-year zero-coupon bonds with a face value of \$20 trillion. The Treasury issues the bonds for \$5 trillion, enabling Congress to balance the budget without controversial spending cuts or taxation increases. Under the cash method of accounting, Congress must report expenditures when paid, so it will have no obligation to report any expense associated with the bonds for twenty years. Yet, as Seto points out, basic finance theory informs us that the zero-coupon bonds are equivalent to bonds in the face amount of \$5 trillion paying an annual interest rate of 7.18%.³⁰¹ Accordingly, Congress will have incurred interest expenses over the course of twenty years but will have no obligation to report any expense until year twenty, when many of the legislators who authorized the sale of bonds are no longer in office.

This potential for avoidance arises any time the government incurs an obligation that it does not immediately pay.³⁰² If the balanced budget amendment is to have any rigor at all, the federal courts would be required to limit Congress's ability to engage in these smoke and mirrors accounting devices.³⁰³ Yet because the possible accounting

297. *See id.* at 1480.

298. *See id.*

299. *See id.* at 1481-91.

300. As of 1997, the national debt stood at \$5.3 trillion. *See S. REP. NO. 105-3*, at 7 (1997).

301. *See Seto, supra* note 124, at 1483.

302. *See id.* at 1484 (noting that social security also involves future obligations incurred by Congress that have no current budgetary impact); *see also SHAVIRO, supra* note 39, at 254 (noting that Congress has relied on the ingenuity of accountants rather than genuine spending reductions to meet deficit targets).

303. Seto also explained how the government, using the cash method of accounting, could manipulate the budget around capital expenditures and receipts, sales of property, and the definition of "debt." *See Seto, supra* note 124, at 1485-90. In the context of the Gramm-Rudman-

manipulations are literally endless, the court would be forced to micromanage the federal budgeting process, which raises serious separation of powers issues.³⁰⁴

The accrual method of accounting raises its own enforcement problems. Accrual accounting focuses on the substance of the financial transaction, requiring the reporting entity to exercise judgment to translate the substance into numbers. As Seto points out, "because the reporting entity almost always has an incentive to bias the judgment in one direction or another, its judgment requires outside review."³⁰⁵ The accrual method, therefore, would also force the courts to micromanage the federal budgetary process, requiring judges to address financial controversies far beyond their legal expertise.³⁰⁶ The Supreme Court would, in effect, be forced to make policy decisions that have traditionally been reserved for elected officials.

If these fiscal and administrative complexities could be overcome, there still remains the difficult question of who would have standing to bring a suit under the amendment if and when the government fails to balance the budget.³⁰⁷ A number of theorists and commentators ar-

Hollings Act, which mandated that Congress balanced the budget by 1991, theorists have noted that congressional leaders also used creative accounting mechanisms to satisfy the technical requirements of the Act. In its effort to meet the target, Congress engaged in a number of techniques that enabled it to "reduce" spending. For example, it was able to save \$2.9 billion simply by moving a military payday back one day to place it in the next fiscal year. See SHAVIRO, *supra* note 39, at 254. And, on another occasion, Congress saved \$19.9 billion through the adoption of intentionally overoptimistic economic assumptions. See *id.*

304. The threat of intensive judicial review has worried a number of constitutional scholars. See Robert Bork, *Would a Budget Amendment Work?*, WALL ST. J., Apr. 4, 1979, at 20 ("The language and the subject matter are technical, so that almost endless opportunities for litigation, and hence for judicial dominance in the budget process, exist. Terms must be defined under endlessly varying circumstances; conventions about statistics, accounting, budget making, and other arcane matters must be probed and specified."); Sullivan, *supra* note 15, at 701-02 (noting the court might be required to intervene in the budget controversies, thereby undermining "the original assignment of the taxing, spending, and borrowing powers"); see also Donald B. Tobin, *The Balanced Budget Amendment: Will Judges Become Accountants? A Look at State Experiences*, 12 J.L. & POL. 153 (1996) (noting that the amendment will produce increased judicial activism).

305. Seto, *supra* note 124, at 1492.

306. Charles Schultze has identified a number of problems associated with the administration of a balanced budget. First, the budget is based on economic forecasts that may or may not prove to be correct. Thus, if the balanced budget is to be enforced, the budget would have to be continually revised throughout the year to ensure taxes and expenditures match. See Schultze, *supra* note 288, at 120. Moreover, a number of federal programs, such as the postal system, are not included in the budget. With the existence of a balanced budget amendment, many more expenditures will be moved off-budget to avoid the constitutional requirements. See *id.* at 121. Finally, Schultze notes that the accounting questions would be endless—transforming judicial interpretation into "budgetary and economic policymaking." *Id.*; see also SHAVIRO, *supra* note 39, at 260-61 (suggesting the federal courts will be extremely reluctant to take on the responsibility of enforcing a balanced budget requirement due to their lack of expertise and institutional capacity to implement the mandate).

307. A litigant must show that she has a personal stake in the suit, has suffered real or threatened injury, and the injury is likely to be redressed by the court. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 482-83 (1982). The litigant will have serious difficulty proving she has a personal stake in the outcome of the case. It is insufficient for the

gue there is no individual who would satisfy the Supreme Court's criteria for standing.³⁰⁸ Even if a claimant is able to survive the standing hurdle, the court may nevertheless apply the political question doctrine,³⁰⁹ which stands for the proposition that certain issues must be resolved by the executive and/or legislative branch without unnecessary judicial intervention. Because fiscal policymaking decisions involve the reconciliation of competing priorities, theorists frequently argue they involve inherently legislative questions inappropriate for judicial intervention.³¹⁰

Of course, the view that a balanced budget amendment will be free of court oversight is not universally held. Indeed, many of the country's most prominent constitutional scholars argue that a constitutional mandate to balance the budget will subject congressional fiscal measures to court review. Professor Kathleen Sullivan has provided the most thoughtful consideration of the issue in congressional testimony, correspondence with federal legislators, and scholarly articles.³¹¹ She argues that taxpayers, congressional members, and parties aggrieved by government activities in violation of the amendment might have standing to bring a federal lawsuit.³¹² Moreover, she suggests that the political question doctrine will not eliminate court oversight because the proposed amendments have not reserved enforcement exclusively for Congress and do not raise matters that lie beyond the court's competence.³¹³ Finally, Sullivan ar-

litigant to demonstrate that she has suffered an injury shared generally by the rest of the citizenry. *See* *Raines v. Byrd*, 117 S. Ct. 2312, 2322-24 (1997) (holding congressional members lacked standing to bring suit challenging the constitutionality of the Line Item Veto); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216-19 (1974) (stating it is insufficient to allege an injury that is related to the fact the government has violated the law); *see also* Gay Aynesworth Crosthwait, Note, *Article III Problems in Enforcing the Balanced Budget Amendment*, 83 COLUM. L. REV. 1065, 1073-82 (1983) (exploring possible suits by taxpayers, citizens, and legislators and arguing that the court is unlikely to find that any of these individuals have standing).

308. *See* Crosthwait, *supra* note 307, at 1065 (exploring Supreme Court precedent and arguing no one will have standing to challenge Congress's failure to balance a budget); *see also* S. REP. NO. 105-3, at 10-13 (1997) (same). *But see* Note, *supra* note 15, at 1612-15 (arguing taxpayers would have standing to bring a suit if Congress failed to balance the budget).

309. *See* S. REP. NO. 105-3, at 10-12 (1997). *But see* Note, *supra* note 15, at 1615-19 (arguing the political question doctrine would not be an insurmountable hurdle to judicial enforcement). *See also generally* Louis Henken, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976) (discussing political question doctrine).

310. *See* James W. Bowen, *Enforcing the Balanced Budget Amendment*, 4 SETON HALL CONST. L.J. 565, 593-608 (1994) (exploring both the standing and political question doctrines); Peter W. Rodino, Jr., *The Proposed Balanced Budget/Tax Limitation Constitutional Amendment: No Balance, No Limits*, 10 HASTINGS CONST. L.Q. 785, 801 (1983) (arguing fiscal policy decisions must be left to the legislature); Seto, *supra* note 124, at 1507 & n.235 (describing the congressional statements of 12 theorists who believe that the courts lack institutional competence to set priorities with regard to taxing and spending).

311. *See* 143 CONG. REC. S1714-15 (daily ed. Feb. 27, 1997) (statement of Sen. Kennedy) (entering into record a letter from Professor Kathleen M. Sullivan addressing the legal questions with regard to court oversight); Sullivan, *supra* note 15, at 701-02.

312. *See* 143 CONG. REC. S1715 (daily ed. Feb. 27, 1997) (letter of Kathleen M. Sullivan).

313. *See id.*

gues that there are no prudential or procedural reasons for the court to eliminate its role in controversies that arise under a balanced budget mandate.³¹⁴

The important point here is not whether a balanced budget amendment will subject federal fiscal policymaking to court review, but rather the way in which a legislator's opinion dictates her position on the issue. Legislators supporting the balanced budget strongly believe the federal courts will have no authority to review fiscal decisions,³¹⁵ while those opposed to the balanced budget worry the courts will have such power.³¹⁶ In short, legislators widely agree that the judiciary should not intervene in budgeting decisions. This unanimity of opinion, while due, in part, to concerns about separation of powers, suggests that lawmakers are actively seeking to avoid the traditional outside causal mechanism for enforcing constitutional provisions. Without effective enforcement, the balanced budget mandate serves as a political symbol of legislative responsibility and small government, but will not necessarily transform the contemporary fiscal process as fiscal constitutionalists hope it will.

3. *Proposed Outside Causal Mechanisms*

A number of theorists have devised alternative enforcement mechanisms that would ensure the satisfaction of Elster's third criterion for precommitment. Daniel Shaviro, for example, has explored the possibility of creating an independent body similar to the Federal Reserve Board as a means to enforce a balanced budget amendment.³¹⁷ A constitutionally created independent agency, Shaviro argues, could be responsible for preventing smoke and mirrors tactics and budget manipulations.³¹⁸ In the event that Congress fails to comply with the constitutional mandate to balance the budget, the agency could be responsible for determining the amount of spending cuts necessary.³¹⁹ Theodore Seto has proposed a similar method for enforcing a balanced budget mandate. Through the creation of a constitutional

314. *See id.*

315. *See S. REP. NO. 105-3*, at 10-13 (1997).

316. *See* 143 CONG. REC. S1715 (daily ed. Feb. 27, 1997) (statement of Sen. Kennedy).

317. *See* SHAVIRO, *supra* note 39, at 268-71.

318. *See id.* at 270 (exploring the value of setting up such an agency but noting that some other agency would be responsible for administering the cuts). The Gramm-Rudman-Hollings Act, adopted in 1985 in the effort to balance the budget, sought to give an outside body (the Comptroller General) the power to trigger automatic spending cuts when the budget was out of balance. The Supreme Court, however, held this triggering provision unconstitutional because it effectively transferred power to a nonexecutive office. *See* *Bowsher v. Synar*, 478 U.S. 714, 732-33 (1986). *See also generally* L. Harold Levinson, *Balancing Acts: Bowsher v. Synar, Gramm-Rudman-Hollings, and Beyond*, 72 CORNELL L. REV. 527 (1987) (exploring Bowsher's potential impact on future budgetary constraints). Congress then amended the Act by assigning the sequestration power to the executive office of management and budget. *See* SHAVIRO, *supra* note 39, at 252.

319. *See* SHAVIRO, *supra* note 39, at 270.

body independent of the three existing branches, Seto argues that individuals with financial expertise could be assigned the task of interpreting complicated fiscal rules, defining budgetary targets, and determining whether targets have been met.³²⁰

Shaviro and Seto have designed mechanisms that arguably create “an external causal process” for implementing the balanced budget amendment and come closer to satisfying Elster’s criterion for precommitment. Because the proposals have the potential to bind effectively the legislature by transferring power to an independent body, however, congressional members are more than likely to reject the enforcement mechanisms just as they have successfully rejected various other proposed constitutional changes that limit their policymaking powers.³²¹ Indeed, while legislators have held hearings on the balanced budget amendment almost every year since 1979 and have submitted a number of initiatives to the House and the Senate for vote, none of the congressional proposals have included enforcement mechanisms even remotely similar to those devised by Shaviro or Seto.³²² Instead, every balanced budget amendment considered since 1979 has reserved for Congress both the power to define a balanced budget and to take corrective action if it fails to comply voluntarily with its own requirements.³²³ In effect, the legislators have steadfastly refused to adopt or even to consider a truly rigorous and effective balanced budget amendment.³²⁴

320. Seto, however, does not advocate that the body be responsible for formulating a remedy if Congress fails to meet its target. *See* Seto, *supra* note 124, at 1514.

321. *See* Boudreaux & Pritchard, *supra* note 67, at 151-52 (arguing Congress has successfully avoided ratifying any constitutional amendments that would diminish its power).

322. *See, e.g.*, S.J. Res. 58, 97th Cong. (1981) (reserving for Congress the power to enforce the balanced budget amendment in Section 4 of the proposal); H.J. Res. 350, 97th Cong. (1982) (failing to identify the enforcement body); S.J. Res. 225, 99th Cong. (1986) (same); H.R.J. Res. 268, 101st Cong. (1990) (same); S.J. Res. 298, 102d Cong. (1992) (allowing the president to propose a budget but failing to name the enforcing body); S.J. Res. 41, 103d Cong. (1993) (reserving for Congress the right to enforce violations of the balanced budget amendment); H.R.J. Res. 1, 104th Cong. (1995) (same); S.J. Res. 1, 105th Cong. (1997) (same).

While Gramm-Rudman-Hollings did impose outside enforcement mechanisms, *see supra* note 308, this is not surprising. Congress would agree to a statutory constraint but not a constitutional constraint in light of the fact that the former can easily be repealed, whereas the latter type of enforcement mechanism is far more durable. *See supra* notes 61-68 and accompanying text (discussing the durability of constitutional provisions compared to ordinary statutory provisions).

323. *See supra* note 194.

324. The *proponents* of the balanced budget amendment have expressed great concern over the possibility that an outside body would be responsible for enforcing the amendment, thereby upsetting the traditional balance of power. *See* S. REP. NO. 105-3, at 7-16 (1997) (discussing the perceived problems associated with permitting the court to enforce the balanced budget amendment or, alternatively, permitting the executive to impound funds to prevent deficits).

V. BALANCED BUDGETS WITHOUT CONSTITUTIONAL MANDATES:
THE ROLE OF FISCAL NORMS

An important aspect of the balanced budget controversy that commentators generally ignore revolves around the possibility of balanced budgets even in the absence of a constitutional mandate. Although fiscal constitutionalists claim this is not a possibility, history suggests otherwise. From 1789 through 1932, for example, balanced budgets were the norm,³²⁵ and on several occasions throughout that time Congress ran a budgetary surplus.³²⁶ Moreover, recent fiscal periods also suggest this possibility. The current legislature and the Clinton administration have worked together to greatly reduce the budget deficit, and they claim that they will produce a budget surplus in the near future. These balanced budgets and budget surpluses were (or will be) achieved despite the alleged defects in the political process and despite the fact that no constitutional mandate to balance the budget exists. The obvious question that arises is: what explains the observed differences in tax and spending outcomes in these different eras?

John Cogan points to institutional changes that occurred in the budgeting process during the period in which deficit spending increased. He argues that prior to the 1930s, Congress allocated jurisdiction over tax and spending legislation to one or two committees in each house.³²⁷ This type of institutional arrangement awarded the benefits of public spending to just a few legislators, and it imposed the political consequences of irresponsible spending on the same individuals. According to Cogan, this decision-making process led Congress to engage in very little deficit spending.³²⁸ As budgetary decisionmaking became decentralized in the 1930s, however, the propensity for deficit spending drastically increased.³²⁹ Decentralization enabled a number of committees and committee members to reap the political rewards associated with higher spending, but at the same time imposed only a portion of the adverse political consequences of financing higher expenditures on each representative. This led to a regime of universalism under which no individual committee or committee member had an institutional reason for resisting increased expendi-

325. See *id.* at 8 (noting that prior to 1932 balanced budgets were the norm, whereas after 1932 unbalanced budgets were the norm); SAVAGE, *supra* note 132, at 54-160 (tracing the debates over deficits and surpluses and noting that balanced budgets were the norm); SHAVIRO, *supra* note 39, at 17-27 (providing a brief overview of federal debts and deficits and noting that the New Deal and the rise of Keynesianism began the shift from a norm of balanced budgets to unbalanced budgets); Seto, *supra* note 124, at 1468 (criticizing fiscal constitutional theorists for failing to discuss this history).

326. See S. REP. NO. 105-3, at 8; SAVAGE, *supra* note 132, at 130-73.

327. See W. Mark Crain, *Legislative Organization of Fiscal Policy*, 38 J.L. & ECON. 311, 313 (1995).

328. See *id.*

329. See *id.*

tures, but all had an incentive to offer them in the first place.³³⁰ In short, Cogan's work suggests that institutional reforms, not constitutional mandates, ensure balanced budgets.³³¹

A return to the seniority system that allocates power to a single committee is unlikely at least in the foreseeable future.³³² But there are various other methods for simulating this type of seniority system in contemporary political institutions. Indeed, many argue the line item veto would have had just this potential. A line item veto vests the power to cancel individual programs with a single politician, the President of the United States. "It thus moves important budget decisions to an elected official who will not be able to disclaim responsibility either on the ground of being one in a collective decision-making process or of being faced with an all-or-nothing choice."³³³ The line item veto, therefore, may have cured the problems that Cogan points to with regard to decentralization. The legislation, in effect, would have enabled voters to hold a single politician, the President, accountable for budgetary decisions in general and budget deficits in particular. The fact that the deficit dramatically decreased following the adoption of the line item veto in 1996 supports the theory that a centralized system is necessary to avoid major federal budget imbalances.

It is not difficult to see, however, that there are two problems with the inference that presidential control would minimize the deficit.³³⁴ First, empirical evidence suggests that Congress is more fiscally conservative than the President.³³⁵ Giving the President more responsibility and power, therefore, will not necessarily lead him to pursue balanced budgets. Second, even if the line item veto did work to constrain the President (and it might given that the voters are more likely to hold the President responsible for deficit spending), the recently adopted legislation does not give him all that much power. As Elizabeth Garrett points out, the 1996 Act contains countless explicit and implicit mechanisms for Congress to retain authority over budgetary procedures.³³⁶ Indeed, the Act has so many loopholes that it most

330. *See id.*

331. *See id.*; *see also* Norman J. Ornstein, *The Politics of the Deficit*, in *ESSAYS IN CONTEMPORARY ECONOMIC PROBLEMS*, 1985: THE ECONOMY IN DEFICIT 311, 319-29 (Phillip Cagan ed., 1985) (arguing that "democratizing and decentralizing power to a large number of subcommittees, to rank-and-file members, and to staff, removed many of the existing restraints on the growth of federal spending").

332. *See Elliott, supra* note 14, at 1102.

333. Elizabeth Garrett, *Understanding the Line Item Veto Act of 1996*, at 10 (draft manuscript, on file with author).

334. However, the permanent effects of the line item veto will be impossible to analyze because of the U.S. Supreme Court's recent ruling that the line item veto is unconstitutional. *See Clinton v. City of New York*, 118 S. Ct. 2091, 2107-08 (1998).

335. *See ARNOLD, supra* note 47, at 156, 168-70.

336. *See Garrett, supra* note 333, at 10.

likely has had only a slight disciplinary effect, if any at all, on the fiscal process.³³⁷

A competing explanation for the rise and decline of deficit spending is related to social and political norms that have emerged from the deliberation and debate around budgetary questions. Theorists claim that, prior to World War II, ordinary prudence suggested that neither individuals nor institutions should spend beyond their means. Like individuals who objected to debtor-creditor relations, politicians "would have considered it to be immoral (to be a sin) to spend more than they were willing to generate in tax revenue."³³⁸ With the extreme hardships experienced during the depression, however, these widely held social attitudes began to change. Many prominent thinkers argued it was incumbent upon the government to alleviate the economic difficulties experienced by so many individuals, even if such action required the issuance of public debt.³³⁹ Moreover, the 1937 publication of John Maynard Keynes's book, *The General Theory of Employment, Interest, and Money*, offered politicians an economic theory for pursuing spending programs without raising the tax revenue necessary to pay for them. Keynes argued that deficit spending was not only fiscally responsible but necessary to steer advanced, industrial economies toward growth and stability.³⁴⁰ Indeed, Keynes argued it was the norm of balanced budgets and the refusal to pursue government spending programs that may have led Western nations into the 1930s depression.³⁴¹ Keynes's work had a powerful impact on the thinking at the time, and some attribute the changes in fiscal and budgetary norms to the publication of his book.³⁴²

337. See Marc Lacey, *Senate Reverses Clinton Veto; Line Item Power is Under Assault*, SAN JOSE MERCURY NEWS, Feb. 26, 1998, at A7 (noting that the Senate voted to reverse 38 military projects eliminated by the White House).

338. James Buchanan, *supra* note 23, at 347-48.

339. See BUCHANAN & WAGNER, *supra* note 5, at 38-40.

340. See KEYNES, *supra* note 43, at 374, 380-88 (arguing that active government intervention is the only way to avoid destruction of the economy).

341. As Keynes explained:

When anyone cuts down expenditure, whether as an individual or town council or a Government Department, next morning someone for sure finds that his income has been cut off, and that is not the end of the story. The fellow who wakes up to find that his income is reduced or that he is thrown out of work . . . is compelled in his turn to cut down his expenditure, whether he wants to or not.

21 JOHN MAYNARD KEYNES, *THE COLLECTED WRITINGS OF JOHN MAYNARD KEYNES* 334-35 (1973).

342. It is no accident, according to the fiscal constitutionalists, that politicians of all political stripes were persuaded by Keynesian theory. See Martin Feldstein, *The Retreat from Keynesian Economics*, 64 PUB. INTEREST 92, 93 (1981) (quoting President Nixon as saying, "We are all Keynesians now," and noting that it is difficult to overstate the influence of Keynes's theory on economists). Keynesianism legitimated congressional spending programs in general and deficit finance in particular. This type of fiscal freedom, in turn, enabled legislators to obtain greater levels of votes and contributions while appearing to act for the greater public good. See BUCHANAN & WAGNER, *supra* note 5, at 93-103. In short, Keynesian economic theory supplanted classical economic theory not because it had greater predictive power but for purely political reasons.

While Keynes may not be entirely responsible for the rise in deficit spending, it is clear that his economic theory justified the transformation of budget norms. President Kennedy was the first executive to propose that Congress increase the deficit as a means for promoting national economic growth. Kennedy's economic advisors were all committed Keynesians who were convinced that a tax cut would stimulate the economy, ultimately producing increased tax revenue that would eliminate the planned deficit.³⁴³ This causal relationship, however, might also explain the current demise in federal deficit spending. Keynesianism is unambiguously on the decline—if not completely fallen.³⁴⁴ Most economists agree that the stagflation that occurred in the 1970s disproved one of Keynes's central theses: that high inflation and high unemployment cannot simultaneously occur.³⁴⁵ Accordingly, the 1980s saw a widespread rejection of Keynesian theory and a resurgence of neoclassical economic thought.³⁴⁶ With the decline of the primary intellectual rationale for deficit spending, it is not surprising that Congress and the President have reduced their willingness to engage in deficit spending.³⁴⁷

It might be argued that the decline in Keynesianism occurred in the 1980s, an era when the federal budget deficit dramatically increased under President Reagan. The recent decrease in the budget deficit, therefore, could simply be an anomaly that is unrelated to the decline in support of Keynesian theory. Social norms do not change instantaneously, however; just as Keynesianism did not attain wide-

343. See ARNOLD, *supra* note 47, at 159-60.

344. See Walter Eltis, *The Continuing Revolution of Keynes to Economic Theory*, in KEYNES AND ECONOMIC POLICY: THE REVOLUTION OF THE GENERAL THEORY AFTER FIFTY YEARS 451, 451-62 (Walter Eltis & Peter Sinclair eds., 1988) (noting that Keynesian theory has only limited value for contemporary policymaking); Feldstein, *supra* note 341, at 92-93, 104 (noting that the economics profession and the social policymakers have retreated from Keynesian theory); J.A. Kregel, *The Viability of Economic Policy and the Priorities of Economic Policy*, 17 J. POST KEYNESIAN THEORY 261, 271 (1994) (stating that what changed in the 1980s was not the introduction of supply-side theory but "the disappearance of Keynesian policy priorities"). See generally Abba P. Lerner, *Keynesianism: Alive, If Not So Well, at Forty*, in FISCAL RESPONSIBILITY IN CONSTITUTIONAL DEMOCRACY 59 (James M. Buchanan & Richard E. Wagner eds., 1978) (exploring the decline of Keynesianism).

345. See RONALD KING, MONEY, TIME, AND POLITICS 423-29 (1995) (noting that because Keynesian theory called for a budget deficit in periods of high unemployment and a budget surplus during times of inflation, fiscal policy analysts were baffled about the policy prescription for the economic downturn in the 1970s); CATHIE J. MARTIN, SHIFTING THE BURDEN: THE STRUGGLE OVER GROWTH AND CORPORATE TAXATION 109-10 (1991) (discussing the economic slowdown that occurred in the 1970s).

346. See ARNOLD, *supra* note 47, at 166-67 (briefly exploring the decline of Keynesianism and the various competing theories that were put forward to replace it); see also BRUCE R. BARTLETT, REAGANOMICS 1-11 (1981) (discussing the major tenets of supply-side economics and the move to classical economic thought); ANTHONY S. CAMPAGNA, U.S. NATIONAL ECONOMIC POLICY 1917-1985, at 482-543 (1987) (same); Anandi P. Sahu & Ronald L. Tracy, *Introduction*, in THE ECONOMIC LEGACY OF THE REAGAN YEARS: EUPHORIA OR CHAOS 10 (Anandi P. Sahu & Ronald L. Tracy eds., 1991) (same).

347. Although deficit spending is not perceived to be wholly irresponsible, its acceptance during times of economic growth and stability has clearly eroded.

spread and universal acceptance for twenty-five years after Keynes wrote *A General Theory*,³⁴⁸ it is not surprising to find that deficit finance remained the norm, despite the fact Keynesian theory no longer served to legitimate it throughout the 1980s.

Importantly, while the budgeting process did not immediately transform after the rejection of Keynesian theory, the rhetoric around fiscal issues dramatically shifted in the 1970s and 1980s. As noted above, special interest groups, popular voters, and scholarly theorists began to object to deficit spending in greater numbers than ever before.³⁴⁹ At the same time, Congress held annual legislative hearings on the subject, and many congressional leaders sought to amass the votes necessary to ratify a balanced budget amendment to the U.S. Constitution.³⁵⁰ It is possible that this constant debate and deliberation not only reflected but helped to create a shift in popular and expert opinion on public debt.³⁵¹ While deficit spending is certainly not viewed as wholly irresponsible, most agree that Congress must have some limit on its ability to borrow.³⁵²

Moreover, this change in fiscal views seems to have prompted Congress to adopt a series of deficit-reducing measures in the statutory context. The Budget Enforcement Act of 1990,³⁵³ for example, forces Congress to pay for all new tax expenditures with a taxation increase, and the Line Item Veto Act of 1996³⁵⁴ enables the executive to eliminate spending programs that Congress has irresponsibly enacted. While scholars have highlighted the escape hatches and loopholes contained in these pieces of legislation, many argue that they will have some impact on the budgetary process.³⁵⁵

Ironically, if the public debate produced a change in attitudes, which, in turn, produced a change in political institutions, the fiscal constitutionalists may have accomplished their goal outside the constitutional setting. In short, the key to reforming political institutions may lie more with deliberation, debate, and the transformation of social and political norms than with more formal precommitment strate-

348. See Richard A. Musgrave, *U.S. Fiscal Policy, Keynes, and Keynesian Economics*, 10 J. POST KEYNESIAN ECON. 171, 171-75 (1987) (discussing early policymakers' hesitation to accept Keynesian theory).

349. See *supra* notes 203-17 and accompanying text.

350. See *supra* notes 11-14 and accompanying text.

351. See Robert Pear, *Budget Heroes Include Bush and Gorbachev*, N.Y. TIMES, Jan. 19, 1998, at A5 (noting that the politicians' endless drumbeat of budget worries may have produced the budget surplus).

352. See *supra* notes 218-69 and accompanying text (discussing popular views on private and public debt).

353. Budget Enforcement Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (codified in scattered sections of 2 U.S.C. (1994)).

354. The Line Item Veto Act of 1996, Pub. L. 104-130, 110 Stat. 1200 (1996) (codified at 2 U.S.C.A. § 691 (West 1997)).

355. See Glen O. Robinson, *Public Choice Speculations on the Item Veto*, 74 VA. L. REV. 403, 419-22 (1985) (arguing line item veto may arrest private interest legislation); Garrett, *supra* note 333, at 10.

gies. Fiscal constitutionalists may argue that the recent reduction in the size of the deficit is not due to the national debate on the subject or to the changed social norms but to a strong market economy that has produced tax revenue beyond that which was expected. Without a constitutional mandate to balance the budget, fiscal constitutionalists predict Congress will once again produce a massive public deficit, particularly when the baby boomers retire and begin to make claims under the Medicare and Social Security laws.³⁵⁶ The problem with this claim is that it only accounts for the contemporary decline in the deficit spending—it fails to account for the long history of budget balances and budget surpluses prior to World War II.

VI. CONCLUSION

The balanced budget amendment has been the source of controversy and debate for the last several decades. Countless theorists and commentators have explored the normative questions associated with the amendment, but only the fiscal constitutionalists have given serious consideration to the possibility of ratification. This article responds to the fiscal constitutionalists and argues that many of their underlying assumptions are problematic. In particular, I argue the constitutional setting will not impose a veil of ignorance, enabling participants in the political process to rise above their own self-interested ends. While legislators may be able to render impartial decisions on some constitutional questions, they are not in a position to do so in the context of the balanced budget amendment. Because the budget proposal imposes serious, identifiable personal and political costs upon voters and legislators, ratification is virtually impossible. Indeed, the only budget amendment that legislators are likely to adopt is an *ineffective* mandate that enables the politicians to posture as stern advocates of the public good while preserving their unlimited fiscal freedom. Finally, the debate over the balanced budget amendment may have produced a substantial shift in fiscal norms which, in turn, has enabled Congress and the Executive to reduce the size of the budget in the statutory context. If the legislators continue with this more restrained budgetary process, the argument for a balanced budget amendment dissolves. Importantly, this article does not mean to suggest the fiscal constitutionalists have engaged in a flawed or useless endeavor. On the contrary, they may have unintentionally accomplished their ends without forcing a change to our constitutional order—a change many have found deeply problematic.³⁵⁷

356. See 143 CONG. REC. S1153 (daily ed. Feb. 10, 1997) (statement of Sen. Specter) ("We know very well that the so-called baby boomers will present a charge on the Social Security trust fund at a later date—2020—which we will be unable to pay unless we find some way to raise taxes or some way to make other cuts which are unrealistic in the context of what we might expect at that time."); see also *supra* note 123 and accompanying text.

357. See Noll, *supra* note 125, at 209 (criticizing the balanced budget amendment as the "stuff of which political instability is made"); see also *supra* notes 15-17 and accompanying text.